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IN THE

Supreme Court of the United States

No. 322

JOSEPH P. LORDI, Director of the Division of Alcoholic Beverage Control of the Department of Law and Public Safety of the State of New Jersey,

Appellant,

vs.

LOUIS J. EPSTEIN and JULIUS EPSTEIN, t/a. STRATFORD INTERNATIONAL TOBACCO CO.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

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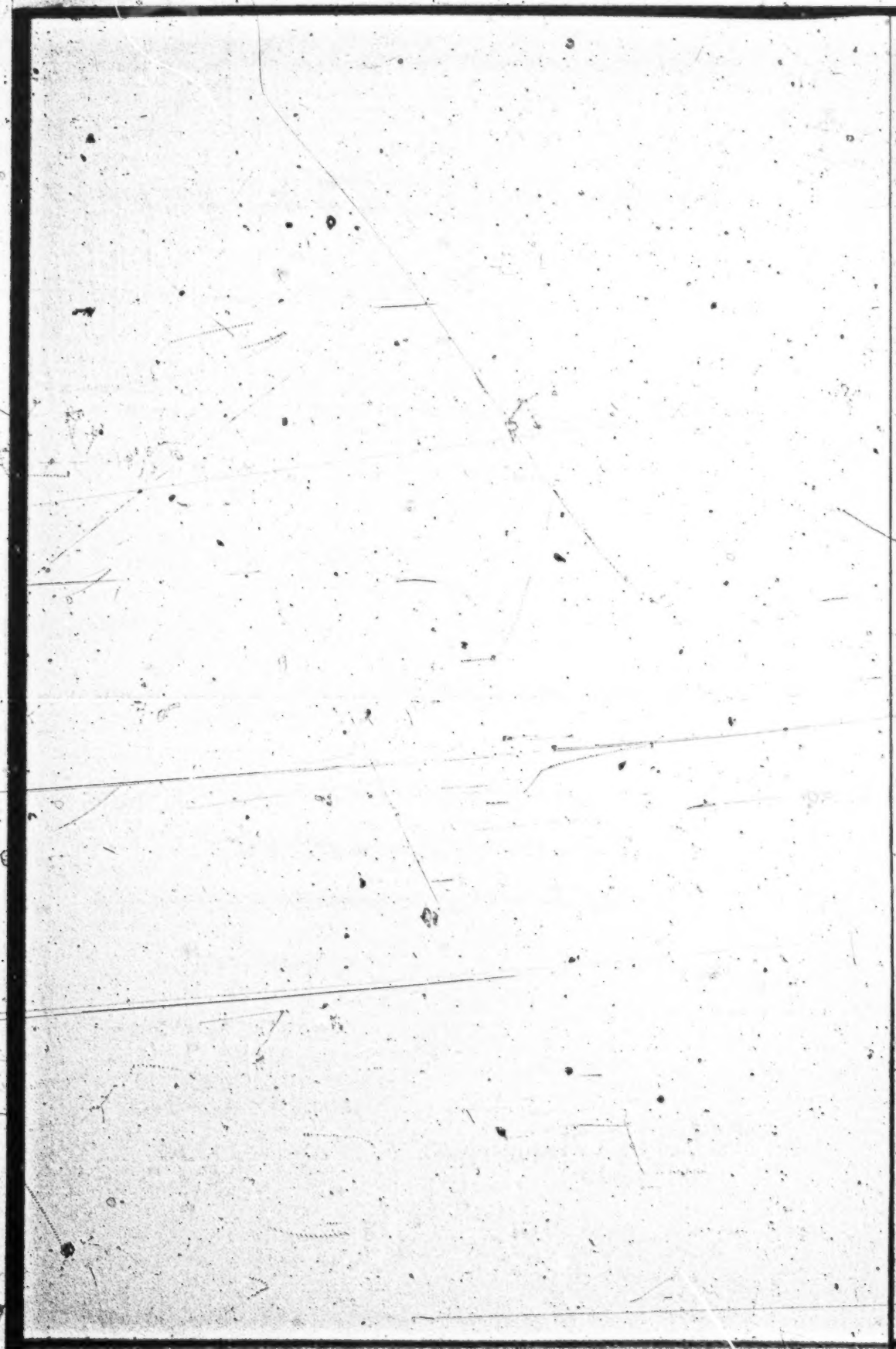

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Appellant,

vs.

LOUIS J. EPSTEIN and JULIUS EPSTEIN, t/a STRATFORD INTERNATIONAL TOBACCO CO.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of a statutory three-judge tribunal of the United States District Court for the District of New Jersey, entered on April 6, 1967, permanently enjoining the State of New Jersey from enforcing or attempting to enforce Section 33:1-11 of the New Jersey Alcoholic Beverage Control Law, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question, meriting review, is presented.

The State of New Jersey has been restrained from regulating, by way of its sales and distribution licensing scheme, commercial transactions which are completely consummated within this State's jurisdiction, which include the solicitation, sale and actual delivery of alcoholic beverages by a wholesaler domiciled in this State to retailers who are ship owners located in this State.

Opinion Below

The opinion of the three-judge tribunal of the District Court for the District of New Jersey, is reported in *Epstein* v. *Lordi*, 261 F. Supp. 921 (D. C. N. J. 1966). A copy of the opinion is attached hereto as Appendix A.

Jurisdiction

This suit was brought by the plaintiff pursuant to 28 U.S.C. §§ 2281 and 2284 to enjoin the enforcement against their business of certain provisions of the New Jersey Alcoholic Beverage Law, N.J.S.A. 33:1-1 to 33:1-96, specifically, N.J.S.A. 33:1-11. The judgment of the District Court was entered on April 6, 1967, and the notice of appeal was filed in that court on May 3, 1967. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963); *Martin* v. *Creasy*, 360 U. S. 219 (1959); *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73 (1960); *Brotherhood of Locomotive Engineers* v. *Chicago R. I. & P. R. Co.*, 382 U. S. 423 (1966).

The Statutes Involved

[1] The New Jersey Statute, Ch. 170, Laws of 1934 of the Revised Statutes of New Jersey, N.J.S.A. 33:1-11, the application of which is drawn into question, provides as follows:

"33:1-11. *Class B licenses; subdivisions; fees*

Class B licenses shall be subdivided and classified as follows:

Plenary wholesale license. 1. The holder of this license shall be entitled, subject to rules and regulations, to sell and distribute alcoholic beverages to retailers and wholesalers licensed in accordance with this chapter, and to sell and distribute without this State to any persons pursuant to the laws of the places of such sale and distribution, and to maintain a warehouse and salesroom; provided however, that the delivery of such alcoholic beverages by the holder of this license to retailers licensed under this Title shall be from inventory in a warehouse located in New Jersey which is operated under a plenary wholesale license. The fee for this license shall be $3,000.00."

. . . .

[Other provisions of the Statute, irrelevant to the present inquiry, have been omitted.]

[2] Also involved on this appeal are the second section of the Twenty-First Amendment to the Federal Constitution and the Commerce Clause of the Federal Constitution, whose relevant sections are set forth below:

(a) U. S. Const. amend. XXI, §2:

"Sec. 2. The transportation or importation into any State, Territory, or possession of the United

States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

(b) U. S. Const. Art. I, §VIII, clause 3:

"The Congress shall have Power. . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

Questions Presented

The questions presented on this appeal are as follows:

1. Whether the State of New Jersey, pursuant to the Twenty-First Amendment to the Federal Constitution, may require the plaintiff-appellee to acquire a plenary wholesale license, pursuant to N.J.S.A. 39:1-11, where a complete commercial transaction, including solicitation, sale and actual delivery of tax-free, in bond liquor occurs within the State of New Jersey.

2. Whether the State regulatory power over alcoholic beverage business transactions which are within the scope of the Twenty-First Amendment is subject to the restrictions and limitations on State power imposed by the Commerce Clause of the Federal Constitution.

3. Whether the New Jersey regulatory scheme, as enunciated in the provisions of the New Jersey Alcoholic Beverage Law, N.J.S.A. 33:1-11, if subject to the strictures of the Commerce Clause, either places an unconstitutional burden on commerce or is so repugnant to or inconsistent with the Commerce Clause as to be violative thereof when applied to the plaintiff herein.

Statement of the Case

This is an appeal from the order of a three judge panel of the District Court for the District of New Jersey permanently enjoining the State of New Jersey from enforcing or attempting to enforce N.J.S.A. 33:1-11 of the New Jersey Alcoholic Beverage Control law. The facts are not in dispute.

The appellees are merchants primarily engaged in the sale of tax free tobaccos to ships in the Port of New York which includes some fifteen ports in the State of New Jersey. As a concomitant to this business the appellees also sell tax free liquor to the ships pursuant to federal permits. Appellees purchase their liquor from foreign and domestic distributors and store it in federally bonded warehouses located in the State of New Jersey. They solicit by telephone (and occasionally in person) and consummate their sales through the offices of the various ships docked in New Jersey ports. They maintain their place of business in Newark, New Jersey, where they accept orders and payment for their sales of alcoholic beverages. The liquor is delivered in appellees' trucks from said warehouses to the ships docked at the piers. The liquor is then sold by the ship owners to the ships' passengers beyond the limit of the jurisdiction of New Jersey. It should be noted and emphasized that federal customs regulations permit the consumption of this liquor when the ship is moored at dockside. (19 CFR §4.11.)

In 1963 the appellees applied to the Division for a plenary wholesale liquor license. A hearing was held on the merits of the application. Objecting to the granting of said application was the Marine Tobacco Co., Inc., which is a wholesaler doing the exact same kind of business as do the appellees. Marine Tobacco Co. operates under a New Jersey plenary wholesale license subject to the condi-

tion that no sales of alcoholic beverages will be made in New Jersey under such license except those which are made in bond to steamship companies to become part of the ships' stores for use beyond the jurisdiction of New Jersey.

At the conclusion of that hearing the Acting Director held that there was a public need for an additional wholesaler in this specific area and he therefore granted plaintiffs' application for a plenary wholesale license subject to the same condition imposed on the Marine Tobacco Co. *Re Epstein*, Alcohol Beverage Control Bulletin 1565, Item 3 (Appendix B, p. 39a).

The appellees refused to accept this restricted plenary wholesale license and notified the Director that they were entitled to an unrestricted plenary wholesale license without limitation or conidtion. The Director then notified the plaintiffs that based upon the record developed at the hearing no public need was established for the issuance of a plenary wholesale license without limiting condition. The plaintiffs appealed this determination to the Appellate Division of the Superior Court of New Jersey. *Epstein* v. *Division of Alcoholic Beverage Control* (A198-63; A-168-63, decided May 21, 1964, not approved for publication), certif. den. 43 N. J. 260, 203 A. 2d 715 (1964) (Appendix C, pp. 40a-42a).

The *per curiam* decision held as follows:

> "We find it unnecessary to decide whether the Director may lawfully impose conditions or limitations on the use of a liquor license. But see *Board of Commissioners of the City of Bayonne* v. *B & L Tavern, Inc., et al*, 42 N. J. 131 (1964). Suffice it to point out that plaintiffs did not attempt to show that there was a public need or necessity for another plenary wholesale license as such. Plaintiffs mis-

state the Director's conclusion as to the public need for a license. All that the Director said was that there was a need for an additional license in the particular area of sales of tax free liquor in bond to ships' stores. Since plaintiffs' present application was for a plenary wholesale license 'without any limitations or conditions', and the Director found no need for such a license to have been established he properly denied plaintiffs' application." (Appendix C, p. 42a).

On March 6, 1964, the appellees applied for a limited transportation certificate. They admitted by stipulation that, notwithstanding their refusal to accept a plenary wholesale license, they have solicited in New Jersey by telephone and by letter and that further, they failed to deny that they also solicited in person the sale of tax free liquor to ships docked at New Jersey piers. The appellees claimed that their present activity was beyond the jurisdiction of the State of New Jersey and hence a limited transportation license should be granted to them. This was the first point in the proceedings wherein the appellees formally challenged the constitutionality of requiring a license for their business. The Director found that the sales and solicitation of sales activity of the appellants was subject to the alcohol beverage laws of this State within the confines of the Twenty-first Amendment as it relates to the Commerce Clause. The Director held as follows:

"In short, New Jersey is not delimiting, in the slightest measure, any of the activity granted to the applicants through its federal permits and authority. They are permitted to sell and to transport provided they obtain licenses from New Jersey to do so." . . . (Alcoholic Beverage Control Bulletin, No. 1597), (Appendix D, p. 43a).

The Director in essence held that since the appellee does not hold a New Jersey license to sell or solicit the sale of tax free liquor (in that he refused said license) he would not be entitled to a limited transportation permit to transport the liquor which he is selling in violation of the laws of New Jersey.

The appellees then appealed this determination to the Appellate Division of the Superior Court. Before the Appellate Division could hear the matter, the suit below was instituted in District Court. The Chief Judge constituted a three judge court to consider the matter in accordance with 28 U. S. C. §2281. The court decided that the appellee's activities were protected by the Commerce Clause and beyond New Jersey's power under the Twenty-first Amendment. The court further held that the application of the New Jersey statute was outside the ambit of the Twenty-first Amendment and was an impermissible restraint on foreign commerce. (Appendix A, p. 35a).

The Court accordingly enjoined the State from enforcing or attempting to enforce N.J.S.A. 33:1-11 against the appellees. (Appendix A, p. 38a).

The Questions Presented are Substantial

The issues presented in this appeal are of importance to the State of New Jersey and its citizens. The regulatory power of the State in a broad area of wholesale liquor sales has been brought into question by the decision below. The decision of the District Court has severely limited the constitutional sphere of activities of the appropriate state agencies. The strictured interpretation placed on the Twenty-First Amendment strains the clear meaning of the Amendment and goes beyond the scope of decisional law on the subject. Serious questions have been raised as to the respective roles of the federal and state authorities in this area that call for resolution by this Court. Further, these are novel questions of constitutional interpretation not heretofore decided by this Court.

POINT I

This appeal raises a novel question of the validity and scope of state power under the Twenty-first Amendment in particular circumstances not hitherto before this Court.

The issue here presented is whether the Twenty-First Amendment empowers the states to reasonably regulate the sale, delivery, and commercially speaking, the "use" of alcoholic beverages within its borders. There is no question of a conflict of state versus federal power, since concurrent jurisdiction of these entities has not been challenged in this litigation. The relationship of state and federal control over intoxicating liquor has long been a subject of judicial consideration, dating back to the *License Cases*, 5 Howard 504, 575-577 (1847). Most recently, the question was before this Court in the cases of *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964) and *Ammex Warehouse Co.* v. *Department of Alcoholic Beverage Control*, 224 F. Supp. 546 (S. D. Cal., S. D. 1963), aff'd 378 U. S. 124 (1963). Initially, we agree with the observation of the Court below that these cases are not dispositive of the instant constitutional issues, nor were their operative facts "completely congruent" with the instant case, *Epstein* v. *Lordi, supra* at 261 F. Supp. p. 930. (Appendix A, p. 10a). As the Court below stated:

> ". . . Indeed, the instant action raises questions expressly left open by the court in the Ammex decision." Id. at 261 F. Supp. p. 930. (Appendix A, p. 10a).
>
> . . . . .
>
> ". . . they [the *Hostetter* v. *Idlewild Bon Voyage* and *Ammex* cases] leave off precisely where the ultimate issue before us begins . . . ." Id. at 261 F. Supp. p. 936. (Appendix A, p. 23a).

In *Hostetter* v. *Idlewild Bon Voyage Co.*, *supra*, the question presented was whether or not the State of New York could, pursuant to the plenary power vested in the states by the Twenty-First Amendment, *absolutely prohibit* the passage of liquor through its territory, which liquor was destined for ultimate delivery and consumption outside the boundaries of the state's jurisdiction. There, the New York State Liquor Authority, upon advice of the Attorney General, informed the Idlewild Liquor Corp. that they were unlicensable under the law. Evidently, the Liquor Corp. did not fulfill the requirements of the New York Alcoholic Beverage Control Law, § 105, Subd. 2, which prescribes certain conditions precedent which must be met before liquor could be sold retail for consumption off the premises, which evidently could not be met by Idlewild. (*Hostetter*, *supra*, 377 U. S. 324, at p. 326.) (The precise question was articulated as follows:

> "... the basic issue we face is whether the Twenty-First Amendment so far obliterates the Commerce Clause as to empower New York to prohibit absolutely the passage of liquor through its territory, under the supervision of the United States Bureau of Customs acting under federal law, for delivery to consumers in foreign countries ...." (377 U. S. at p. 329.)

Likewise, in *Ammex* the plaintiffs could neither qualify for a Wholesalers' license nor a customs Brokers' License under the provisions of California's Alcoholic Beverage Control Act, which two were the only licenses which were even remotely relevant to the activities of the plaintiffs. (*Ammex*, *supra*, 224 F. Supp. 546, at p. 552.)

The factual schemes in both *Hostetter* and *Ammex* were substantially identical. There, the purchaser or customer

would order and pay for liquor at a port of embarkation or border enclave. The liquor was then delivered to a bailee, in the form of a common carrier or customs official, and the bailee would, in turn, actually deliver the packaged beverages to the consumer in a foreign country. While such a transaction is ordinarily deemed to be a completed sale and delivery in the port state within the contemplation of commercial law [cf., Uniform Commercial Code § 401 (2) (American Law Institute, 1958); Uniform Sales Act § 19 Rule 4 (2) (Uniform Laws Annotated, Vol. 1)] this Court obviously considered such a fragmented "delivery" as without the meaning of that term as it is used in the Twenty-First Amendment. In the fact situation *sub judice*, the State seeks to regulate the activities of a wholesaler domiciled within its borders which sells and actually delivers liquor to another wholesaler, also physically present within that state. Here there is a complete commercial transaction involving solicitation, a fully consummated sales agreement, and actual delivery within the state to the purchaser. The fact that the purchaser may resell the alcoholic beverages to passengers of its ships while outside of the state's jurisdiction, is irrelevant to the transaction the state here regulates. It is important to note that federal customs authorities under certain conditions permit the sale and consumption of the subject liquor while the ship is moored at dockside within the territorial jurisdiction of the state (19 CFR § 4.11).

And, of major significance, unlike the state exercise of power in *Hostetter* and *Assunto*, New Jersey does not seek to proscribe the activities of the appellee, but to regulate them. Our State Courts have already ruled that appellee's activities are licensable (Appendix C, p. 40a), and in fact, such a license was afforded him (Appendix C, p. 41a).

It is therefore respectfully submitted that the instant case presents important constitutional questions of first impression, the impact of which will have broad significance throughout the nation.

POINT II

The action of the Court below is contrary to the explicit language and clear meaning of the Twenty-First Amendment.

The language of the Twenty-first Amendment is clear and explicit in its prohibition against the transportation or importation of liquor into any state for "delivery *or* use therein" contrary to the laws thereof. U. S. Const. Amend. XXI, § 2 (emphasis added). There is no question but that the Amendment was structured to give to the states the fullest measure of power in the realm of intoxicating liquors.

> "The purpose of section 2 (of the 21st Amend.) is to restore to the states by constitutional amendment *absolute control* in effect over interstate commerce affecting intoxicating liquors which enters the confines of the states." 76 *Cong. Rec.* 4143 (1933) (emphasis added.)

The early decisional law on the Amendment is indicative of a pervasive judicial attitude to accord the states the full range of powers literally ceded to them by the Amendment. *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59, (1936) (per Brandeis, J.); *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401 (1938) (per Brandeis, J.); *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391 (1939) (per Brandeis, J.). Neither did the Court seek to evade the potential conflict between the Twenty-first

Amendment and the Commerce Clause, as demonstrated in the case of *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395 (1939) (per Brandeis, J.) and *Ziffrin* v. *Reeves*, 308 U. S. 132 (1939) (per McReynolds, J.) which expressed the view that the power of the States pursuant to the Twenty-first Amendment is not limited by the Commerce Clause.

A series of cases served to delimit this expansive power in situations involving the mere passage through a state, of liquor, where both delivery and use occurred in an area that was not within the state's jurisdiction. *Collins* v. *Yosemite Park and Curry Co.*, 304 U. S. 518 (1938) (per Reed, J.); *Johnson* v. *Yellow Cab Transit Co.*, 321 U. S. 383 (1944); and see *During* v. *Valente*, 267 App. Div. 383, 46 N. Y. S. 2d 385 (1944).

The states' authority over the use and abuse of alcoholic beverages has not always been grounded upon the Twenty-first Amendment. In *Duckworth* v. *Arkansas*, 314 U. S. 390 (1941) (per Stone, Chief Justice), the Court upheld a State regulation under the Commerce Clause. In a concurring opinion, Mr. Justice Jackson argued that the Twenty-first Amendment should have been the basis of decision:

> "... the Twenty-first Amendment made the laws as to delivery and use in the state of destination the test of legality of interstate movement. This obviously gives to state law a much greater control over interstate liquor traffic than over commerce in any other commodity.
>
> "If the Twenty-first Amendment is not to be resorted to for the decision of liquor cases, it is on the way to becoming another 'almost forgotten' clause of the Constitution." (p. 399.)

In a similar case, *Carter* v. *Virginia*, 321 U. S. 131 (1944), Mr. Justice Frankfurter, concurring in language singular-

ly relevant to the instant case, stated (at 321 U. S. pp. 140-141):

> "Since we are dealing with a constitutional amendment that should be broadly and colloquially interpreted, the liquor that enters a state in the manner in which the liquor here came into Virginia may, without undue liberty with the English language be deemed for 'delivery' there even though it is consigned for another state. The Twenty-first Amendment prohibits the 'transportation or importation into any state . . . of intoxicating liquors in violation of the laws thereof,' not when the liquor is for delivery *and* use but for 'delivery *or* use therein.' In other words, liquor need not be intended for consumption in a State to be deemed to be imported into the State and therefore be subject to control by the State."
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> . . . .
>
> "And since Virginia derives the power to legislate as she did from the Twenty-first Amendment, *the Commerce Clause does not come into play.*" (p. 143) (Emphasis added.)

Viewed from the historical development of the construction of the Twenty-first Amendment, the Court below has abruptly and without precedential guidance deflated the Constitutional grant of power to the states, first by ignoring the literal language of the amendment, and second, by subordinating that constitutional authority to some hitherto unexpressed federal policy over all liquor transactions in embarkation areas.

Initially, in order to exclude the State's authority in the instant case, the Court had to ignore the salient fact of a completed delivery, or to discount it by ignoring the disjunctive language of the Amendment by requiring a stand-

ard of both delivery *and* use. This kind of construction must have been what was feared by this Court in early decisions when it was indicated that to limit the Amendment in this way "... would involve not a construction of the Amendment, but a rewriting of it." *State Board of Equalization* v. *Young's Market Co., supra,* at 299 U. S. p. 62.

Secondly, the Court below characterized *Hostetter* and *Ammex, supra,* as re-examinations of the "reach" of the Twenty-first Amendment, *supra* at 261 F. Supp. p. 933. (Appendix A, p. 18a). These holdings stand for the proposition that a state may not entirely prohibit foreign commerce in intoxicating liquor where there is no use or consumption in that state and the element of "delivery" is, at most, ambiguous or, more probably, entirely lacking. There is language in *Hostetter* and *Ammex* considering the relationship between the Twenty-first Amendment and the Commerce Clause. The Court below expanded upon the premise that each must be considered in light of the other, and concluded that the cases required an *ad hoc* consideration of the national interests to be protected under the Commerce Clause, *supra* at 261 F. Supp. p. 933 (Appendix A, p. 18a). On this basis, the Court evolved the remarkable rationale that this broad constitutional grant of power to the States must now be subservient to the federal court's vision of national policy as set forth either by Congress or an appropriate federal agency. To render the Constitution subservient to and dependent upon "federal policy" in the absence of some grave national emergency is certainly a revolutionary concept. If this were not enough, the Court below concluded that not only was this a consideration, but a test "not merely to measure the extent of State power under the Twenty-first Amendment, but rather to determine whether the Amendment applies at all . . ." (*Supra* at 261 F. Supp. p. 933, Appendix A, p. 18a). It is obvious that to

use a Commerce Clause test as a condition precedent to the application of the Twenty-first Amendment is neither construction nor interpretation, but rather a judicial revision of the Amendment. Neither the history of the Amendment nor the relevant decisional law even remotely suggest such a construction.

The predicates of State power under the Amendment are "delivery *or* use." Each of these are "colloquial" terms capable of easy definition. Each presents a factual inquiry. The test provided by the Court below seeks to ignore the factual picture of actual physical delivery and make the "consumption" aspect of the word "use" the sole predicate for the exercise of the State's plenary power. Surely, the Court in *Hostetter* and *Ammex* could not have intended such a result.

Once physical delivery has taken place within the jurisdiction, it is of no moment that the ultimate consumption may be elsewhere, or even that this consumption may be in foreign commerce. It could be argued that the majorities in *Hostetter* and *Ammex*, when faced with the prospect of absolute prohibition of foreign trade placed additional weight on the consumption factor and diminished the delivery factor. However, the instant case is of a different coloration and requires no such intellectual gymnastics. Here, the activities of the plaintiff within the State of New Jersey are ample predication for the plenary power of the State under the Twenty-first Amendment.

Since the State statutes in question are valid under the Twenty-first Amendment, we do not believe that a Commerce Clause inquiry is relevant. However, since the Court below found this regulatory scheme invalid thereunder, we respectfully submit that the state's regulation in the instant case is not an undue burden upon interstate commerce.

The crux of the Court's finding of infirmity under the Commerce Clause appears to be that the licensing statute concentrates too much regulation by the State in light of the comprehensive scheme of Federal legislation in the same area. In short, too much to do too little.

There is no showing whatever that the regulations are inconsistent with or repugnant to, or a burden upon commerce.* Certainly, the concept of federal preemption can have no viability in light of the Twenty-first Amendment. Even here, there is no evident congressional intent demonstrated to supercede or preempt state regulation. In fact, the contrary is true. The federal regulations themselves, whose very existence is used below to diminish the scope of State power under the Commerce Clause specifically provide that if the operations of a party are in violation of the laws of the state in which they are to be conducted, an applicant may be denied a permit under the Federal Alcohol Administration Act. 27 U. S. C. A. §204(2) (c) (Pocket Part, 1966). Thus, one of the aims of the Act itself is to enforce the Twenty-first Amendment. 27 U. S. C. A. §203 (Pocket Part, 1966). It therefore appears that the intent of Congress as expressed in Federal liquor legislation manifests an express acceptance of concurrent jurisdiction as well as an overt intention to aid the states in the regulation of liquor, rather than to supplant it.

Of historical importance is the fact that prior to the amendment the states had traditionally exercised consid-

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* It is noted that in the area of Food and Drugs legislation, comprehensive schemes of Federal and State legislation coexist despite the grant of power to Congress under the Commerce Clause, *Savage* v. *Jones*, 225 U. S. 501 (1912); *Patapsco Guano Co.* v. *North Carolina*, 171 U. S. 345 (1898); *Corn Products Ref. Co.* v. *Eddy*, 249 U. S. 427 (1919); *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U. S. 83 (1963).

erably more authority in the area of alcoholic beverages than was the case with other commodities. *The License Cases, supra.* Thus, for the court below to strike down State regulation in the face of comprehensive Federal legislation represents an inversion of legislative priorities, and is contrary to the stated purpose of the Federal legislation and the tradition of liquor regulation in this nation.

CONCLUSION

The question presented by this appeal vitally affect the State of New Jersey and its citizens. They are substantial and of widespread public importance. It is respectfully submitted that this Court should note probable jurisdiction, grant plenary consideration of the Constitutional issues involved and order briefs and oral argument.

Respectfully submitted,

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APPENDIX A

Opinion and Judgment of the Court Below

[*Epstein* v. *Lordi*, 261 F. Supp. 921 (D. C. N. J., 1966)]

Before:

HONORABLE WILLIAM F. SMITH, Circuit Judge
HONORABLE ARTHUR S. LANE, Circuit Judge
HONORABLE JAMES A. COOLAHAN, District Judge

Appearances:

MAX MEHLER, Esq. and HAROLD FISHER, Esq.,
Attorneys for the plaintiffs.

JOSEPH A. HOFFMAN, Esq., Deputy Attorney General of New Jersey,
Attorney for the Defendant.

COOLAHAN, District Judge:

I.

The plaintiffs bring this action pursuant to Sections 2281 and 2284 of Title 28, U. S. C. to enjoin the enforcement against their business of certain provisions of the New Jersey Alcoholic Beverage Law, N.J.S.A. 33:1-1 to 33:1-96. As the basis for an injunction, the complaint seeks a declaration that the state statute, as applied, is repugnant to the Commerce, Export-Import, and Supremacy clauses of the United States Constitution. General jurisdiction is founded upon 28 U. S. C. §1331, a matter in controversy exceeding $10,000.00, and arising under the Constitution or laws of the United States.

Appendix A

The concrete question posed is whether New Jersey can require the plaintiffs to obtain a wholesale liquor license before they engage in the sale of in bond tax free liquor to vessels docked in New Jersey, where such liquor is sold for use in foreign commerce.

The portion of the New Jersey Alcoholic Beverage Law in question is N.J.S.A. 33:1-11 which requires a state issued license for the conduct of wholesale liquor operations in New Jersey.[1] At first, plaintiffs sought such a wholesale license from the appropriate state administrative authorities, but they rejected the wholesale license ultimately proffered because it was restricted. Now they contend that New Jersey can only require them to obtain a trans-

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[1] N.J.S.A. 33:1-11, insofar as pertinent, provides as follows:

"Class B licenses; subdivisions; fees

"Class B licenses shall be subdivided and classified as follows:

"Plenary Wholesale license. 1. The holder of this license shall be entitled, subject to rules and regulations, to sell and distribute alcoholic beverages to retailers and wholesalers licensed in accordance with this chapter, and to sell and distribute without this State to any persons pursuant to the laws of the places of such sale and distribution, and to maintain a warehouse and salesroom; *provided, however, that the delivery of such alcoholic beverages by the holder of this license to retailers licensed under this Title shall be from inventory in a warehouse located in New Jersey which is operated under a plenary wholesale license.* The fee for this license shall be $3,000.00."

The license fee is an annual expense. The remaining subdivisions of §33:1-11 provide for limited licenses authorizing sale and distribution of wines and/or brewed malt beverages and are not in issue.

portation license,[2] and that requiring a wholesale license is unconstitutional.

The pertinent facts have been stipulated by the parties; the remaining determinations are issues of law. Plaintiffs conduct their business as a partnership under the name Stratford International Tobacco Co. [Stratford] from 504 Clinton Avenue, Newark, New Jersey, which premises are not licensed by the State.

Stratford's operations are carried on pursuant to Federal importer's and exporter's basic permits which authorize it to import in-bond liquor into the United States and to sell, deliver and ship such liquor in interstate and foreign commerce. Stratford also holds a license and its drivers are bonded and hold identification cards, all issued by the Bureau of Customs, which authorize its drivers to transport in-bond liquor in Stratford's trucks.

Liquor imported by Stratford enters the Port of New York or the Port of New Jersey [a division of the Port of New York area], where it is consigned to the custody and care of the Collector of Customs. In addition to importing liquors from abroad, Stratford also purchases in bond liquor from bonded distilleries in the United States, which is delivered by bonded carrier into bonded warehouses in New Jersey.

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[2] "33:1-13 Class D licenses: transportation license; fee

"Class D licenses shall be as follows:

"Transportation license. The holder of this license shall be entitled, subject to rules and regulations, to transport alcoholic beverages into, out of, through and within the state of New Jersey and to maintain a warehouse. The fee for this license shall be two hundred dollars."

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All the liquor, whether imported or domestic, is brought into New Jersey by Stratford solely for export. As such, the liquor is constantly subject to the control and custody of the United States Treasury Department, Bureau of Customs or Bureau of Internal Revenue, from the moment of entry into the state until its ultimate release for consumption in foreign commerce. The control is effected through a comprehensive scheme of regulation and inspection procedure pursuant to Sections 309, 311 and 313 of the Tariff Act of 1930, as amended, 19 U. S. C. §§1309, 1311 and 1317, related portions of the Internal Revenue Code, as amended, 26 U. S. C. §§5012, 5062 and Treasury Regulations promulgated by the Bureau of Customs, 19 C. F. R. parts 8, 12, 18, 19, 21, 23 and 25.*

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*The constitutional significance of this regulatory scheme is discussed infra, pp. 23-29. Here we note only the procedures it requires. Upon arrival of the imported liquor consigned to the Collector of Customs, Stratford receives a notice of arrival, bills of lading, and various certificates. The liquor is then carried to a United States Customs bonded warehouse in a bonded truck owned by Stratford, or by a bonded common carrier and, in either event, a vehicle licensed by the Customs for such carriage. The warehouse itself is under the jurisdiction and control of the Federal Government.

Once stored, the liquor may only be withdrawn and delivered pursuant to an equally rigorous policing system. Sales orders are solicited by phone, by mail or in person either at shipping line offices or directly from ship officers at dockside. To withdraw ordered liquor, Stratford obtains a permit with several copies from the Customs office in Newark. The copies are delivered to the customs inspector at the warehouse. He retains a copy and gives two others to the bonded carrier which delivers the liquor in its original package to dockside. At dockside, a second customs inspector makes sure

(Continued on following page)

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On the basis of these facts, the plaintiffs now contend that the wholesale licensing provision of N.J.S.A. §33:1-11 is inapplicable to their enterprise and that they are not licensable under it. In the alternative they argue that if Section 33:1-11 is construed to require a wholesale license for their enterprise, it is unconstitutional.

New Jersey's position throughout this controversy has been threefold; that Stratford's operation is licensable under Section 33:1-11; that plaintiffs cannot solicit, sell and deliver in bond liquor in the manner described without first obtaining a Class B plenary wholesale license; and that this requirement is constitutional.

Plaintiffs' present contentions differ substantially from their position in the State courts. A brief review of the prior proceedings is necessary to fully understand the nature of this variance.

II

About four years ago the plaintiffs, who had been tobacco merchants for many years, expanded their operation to include the sale of tax free tobacco to ships in the Port of New York. However, they soon ascertained

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(Continued from preceding page)

that the liquor is placed on board the ship and sealed; he then sends a copy of the withdrawal permit, properly noted, back to the Customs authorities.

By virtue of these operations, the liquor is legally in bond continuously from the moment of its entry into New Jersey until the delivery on board for Stratford's customer. Moreover, under federal law, such liquor may not be removed from its package nor consumed until the ship is beyond the territorial waters of the United States.

that this business is precarious unless they also sell tax free in bond liquor, since purchasing agents for the shipping companies prefer to buy both items from the same source of supply. Prior to plaintiffs entry into the field, the firm of Marine Tobacco Co. was the exclusive supplier of tax free liquor to ships in the New Jersey Division of the Port of New York.

In the Spring of 1963, the plaintiffs applied for a Class B plenary wholesale license. Marine Tobacco Co. intervened in opposition. The Acting Director found that there was a "public need" for an additional wholesaler in this area. *Re Epstein* A. B. C. Bulletin, 1565, Item 3. He tendered plaintiffs a Class B license, subject to the following special condition:

> "That no sales of alcoholic beverages will be made in New Jersey except only such sales as are made in bond to steamship companies to become part of ships stores for use beyond the jurisdiction of this State."

Plaintiffs rejected this offered license and appealed the decision to the New Jersey Superior Court, Appellate Division. The plaintiffs challenged the Acting Director's statutory authority for adding the proposed restriction to the normal terms of a Class B license; they argued that since he had found a public need for an additional wholesaler, they were entitled to an unrestricted Class B license.

The Appellate Division did not reach the question of the Director's authority to supplement the statutory provisions with additional restrictions upon the license. The Court simply agreed with the Acting Director that the Epsteins had overstated his findings. Since the Acting Di-

rector had only found a public need for an additional competitor in the specific area of sales for overseas consumption, and not for another "plenary license as such", the court affirmed the denial of an unrestricted license. *Epstein* v. *Director of Alcoholic Beverage Control*, App. Div. A-98-63 (May 21, 1964), *cert. denied* 43 N. J., 260 (1964).

Thereafter, on March 6, 1964, the plaintiffs applied for a Class D liquor transportation license. It was stipulated that notwithstanding their failure to obtain a wholesale state license, they had continued to solicit and sell tax free liquor to ships docked in New Jersey.

At this point, for the first time in the State proceedings, the plaintiffs formally challenged the constitutionality of requiring a wholesale license for their business. The Director held that Stratford's solicitation and sales activity were subject to New Jersey's Alcoholic Beverage Law "within the confines of the Twenty-first Amendment as it relates to the Commerce Clause." Defendant's Brief, pg. 4.

The Director concluded that since the plaintiffs had not procured a wholesale license for their solicitation and sales of tax free liquor, they could not be granted a transportation license to transport liquor for such unlicensed activity.

The denial of a transportation license was also appealed to the New Jersey Superior Court, Appellate Division. Pending that appeal, the Director wrote the plaintiffs in February of 1965, noting that Stratford had made specific sales of the kind described above. The letter warned plaintiffs to discontinue the sale and delivery of alcoholic beverages "particularly to ships docked at New Jersey piers," and further threatened prosecution under the New Jersey

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Alcoholic Beverage Law which prohibits "sales" of liquor without a state license and which makes any unlicensed sale a punishable offense.[4]

The plaintiffs allege that this specific threat to their business and their personal liberty constitutes an appropriate case for a three judge court's adjudication and grant of the requested relief.

Thus, the plaintiffs now claim they are not within the purview of the licensing statute and, that in any event they cannot constitutionally be required to obtain a license; but their formal position in the State proceedings, until they applied for the transport license, was that they were entitled to such a license and sought one.

While the defendant has alluded to this change in tactics, he has presented no legal ground for denying the plaintiffs' standing to challenge the constitutionality of the licensing statute, as applied, merely because they did

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[4] Section 33:1-2 prohibits anyone from selling alcoholic beverages in New Jersey without first obtaining a license. "Sale" is defined by Section 33:1-1 as:

> "w. 'Sale'. Every delivery of an alcoholic beverage otherwise than by purely gratuitous title, including deliveries from without this state and deliveries by any person without this state intended for shipment by carrier or otherwise into this state and brought within this state, or the solicitation or acceptance of an order for an alcoholic beverage, and including exchange, barter, traffic in, keeping and exposing for sale, serving with meals, delivering for value, peddling, possessing with an intent to sell, and the gratuitous gift or delivery of any alcoholic beverage by any licensee."

Section 33:1-50 makes it a misdemeanor to make an unlicensed sale in violation of the above statutes.

not choose to challenge it initially in the State Court proceedings.

Moreover, at both the original hearing on Stratford's application for a Class B wholesale license and the appeal from the denial of such a license, the plaintiffs testified that in their view no state license could be required for the sale of tax free liquor in interstate and foreign commerce in the manner they anticipated using. They indicated that the application for such a license was being made only to avoid aggravation and the expense of litigation. *Re Epstein*, ABC Bulletin, *supra*, at 5; *Epstein* v. *Director of Alcoholic Beverage Control*, App. Div. *supra*, Transcript, at 41.

III.

After commencement of this lawsuit, the Chief Judge constituted this three judge Court to consider the matter in accordance with 28 U. S. C. §2281. Invocation of Section 2281 presents two threshold questions as to whether adjudication by a three judge tribunal is appropriate.

First, if prior cases have rendered the constitutional issues moot or settled, the proper procedure is to disband the three judge court and remand the matter to the single district judge before whom it was originally brought. Where previous decisions have foreclosed the possibility that the challenged State statute can stand in the face of constitutional provisions to which it is allegedly repugnant, a three judge Court is not required. *Turner* v. *City of Memphis*, 369 U. S. 350, 353 (1961); *Baily* v. *Patterson*, 369 U. S. 31, 33 (1961) [past cases had established the unconstitutionality of the state laws on their face]. And see *Ex parte Poresky*, 290 U. S. 30 (1933) [challenge to state law's constitutionality was insubstantial on its face].

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The possibility of applying this doctrine to the case before us stems from the substantial parallels between it and the situations before the Court in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1963); and in *Department of Alcoholic Control for California, et al.* v. *Ammex Warehouse*, 378 U. S. 124 (1963). If the *Hostetter* and the *Ammex* cases on their face were dispositive of the constitutional issues, as the defendant contends, then a three judge court would be unwarranted. However, as set forth below, the operative facts in the present matter, insofar as they bear on the constitutional questions, are not completely congruent with those presented by the earlier cases. Indeed, the instant action raises questions expressly left open by the Court in the *Ammex* decision. We conclude that resort to a three judge court was proper, these prior cases notwithstanding.

Nor is this lawsuit one based solely on the ground that the state statute is repugnant to the Supremacy clause because of its conflict with a federal statute. Since 28 U. S. C. 2281 is a technical provision to be construed strictly, *Phillips* v. *United States*, 312 U. S. 46 (1917), suits to enjoin the enforcement of state law resting solely on "supremacy grounds" do not come within the provision for three judge courts. *Swift & Co. et al.* v. *Wickham*, 382 U. S. 11 (1965). It is clear that both the allegations in the complaint, and this Court's decision involve substantial questions of the state statute's repugnancy to other parts of the Constitution besides the Supremacy clause.

IV.

The plaintiffs seek to question both the applicability of the wholesale licensing provision in Section 33:1-11 to their

business, and the constitutionality of such a requirement if the statute is applied. This Court need not consider the first question, since it has been conclusively determined in the State court proceedings. The decision by the Appellate Division of the Superior Court, with certification denied by the New Jersey Supreme Court, was more than a general interpretation of the statute's coverage by the primary authority on New Jersey law. In addition, it offers a determination on the precise question of whether Stratford's operation was within the purview of the licensing requirement.

Affirming the denial by the Acting Director of an unrestricted license, the Appellate Division indicated directly and implicitly that it construed Section 33:1-11 to cover plaintiff's business. The Court directly analyzed Stratford's operation as follows:

> 'The Alcoholic Beverage Control Act does not provide for a special license for the sale of tax free liquor in bond. *Such sales may be made under a plenary wholesale license* of which some seventy-five have been issued in this State." *Epstein* v. *Lordi*, *supra*, at 1, 2 [Emphasis supplied].

Moreover, the decision that Stratford was not entitled to an unrestricted license on the basis of the limited "public need" adduced at the hearing, necessarily assumed that Stratford at least was licensable under the challenged provision, i.e. that the section applied to Stratford's activity. Since this underlying assumption was an essential aspect of the decision, it constitutes an integral part of the Court's holding. *McAlpine* v. *Garfield*, 137 N. J. L. 197 (E. & A., 1948); *School Trustees* v. *Stocker*, 42 N. J. L. 115 (Sup. Ct. 1880); 50 C. J. S. Judgments §723.

Thus, both as a matter of New Jersey's interpretation of its own statutes, and as a matter of collateral estoppel, the plaintiffs are foreclosed from challenging the application of Section 33:1-11 to their business. And, the Appellate Division's conclusion removes the issue of abstention raised in the *Hostetter* case. See 212 F. Supp. 376, 377 (1962).

V.

We turn to the plaintiffs' contention that the wholesale licensing statute, as applied to their business, violates the Commerce Clause. Their claim revives a recurring confrontation of State and Federal powers: the conflict between State regulation of liquor under the Tenth or the Twenty-first Amendments, and the limitations imposed upon the States by the constitutional grant to Congress of power over foreign and interstate commerce.[5]

Apart from the Twenty-first Amendment, New Jersey's authority to regulate liquor stems from its traditional "police power" to regulate activities within its borders for the protection of its citizens; the wholesale license requirement must either be a valid exercise of this police power or, alternatively, come within the ambit of the additional powers conferred by the Amendment.

The potentional evils of intoxicants and the difficulties of keeping them within legal bounds have long been recog-

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[5] Particularly since the enactment of the Twenty-first Amendment, the field has been marked by successive attempts to accommodate State and Federal interests as each new factual pattern demands a reappraisal of State power. See Note, The Twenty-first Amendment Versus the Interstate Commerce Clause, 55 Yale L. J. 815 (1946); Note, The Evolving Scope of State Power under the Twenty-first Amendment, 19 Rutgers L. Rev. 759 (1965).

nized as warranting broad exercise of State authority within the traditional confines of the Commerce Clause. *Leisy* v. *Hardin*, 135 U. S. 100 (1890) and cases cited. The Constitution "has never been deemed to exclude the States from regulating matters primarily of local concern with respect to which Congress has not exercised its power, even though the regulation has some effect on interstate commerce." *Duckworth* v. *Arkansas*, 314 U. S. 390, 394 (1941). The injurious possibilities associated with liquor may justify even more extensive regulation than commerce in less dangerous products. Id. at 396.

On the other hand, State regulation of liquor under the police power, as in other fields of commerce, is invalid if: (a) the subject demands national uniformity so that State action is precluded even absent Federal action; (b) Congress has occupied the field to the exclusion of State regulation; or (c) a particular State statute conflicts directly with an express regulation by Congress. *Cooley* v. *Board of Wardens*, 12 How. 299 (1851); *Kelly* v. *Washington*, 302 U. S. 1 (1937).

Moreover, even where some State regulation of local matters is permissible, the State may still run afoul of the free trade policy of the Commerce Clause if it discriminates against or otherwise unduly burdens interstate commerce. *Huron Cement* v. *Detroit*, 362 U. S. 440 (1959). In short, the regulation must be evenhanded and reasonable; unreasonable burdens on interstate commerce in liquor must fall unless validated by the Twenty-first Amendment. *State Board of Equalization of California* v. *Young's Market*, 299 U. S. 59 (1936) dictum.

Finally, when foreign commerce is involved the national interest is even more clearly paramount. Federal power

over such commerce is closely allied to its exclusive authority in foreign relations and it is buttressed by the Export-Import Clause which prohibits State imposts or duties levied without Congressional consent. "The principle of duality in our system does not touch the authority of Congress in the regulation of foreign commerce." *Board of Trustees* v. *United States*, 289 U. S. 48, 57 (1932).

In marked contrast to these traditional restrictions, the Twenty-first Amendment cedes broad powers to the States by providing:

> "* * * the transportation or importation into any State, Territory or Possession of the United States for delivery or use therein of intoxicating liquor in violation of the laws thereof is hereby prohibited."

Under the Amendment, New Jersey may prohibit completely the manufacture of liquor within its borders and may prohibit or condition the export of such liquor from the State. *Ziffren, Inc.* v. *Reeves*, 308 U. S. 132 (1939). It also has the power to prohibit or to condition in the most discriminatory fashion the importation into its territory of all intoxicants "for delivery or use" within New Jersey, as that phrase is employed in the Twenty-first Amendment. *Finch* v. *McKittrick*, 305 U. S. 395 (1939); *State Board of Equalization* v. *Young's Market*, *supra*.

Where, however, the liquor is not brought into the State for "delivery or use therein", regulation cannot be predicated upon the Amendment.

Thus, if liquor imported into New Jersey is destined for distribution and use in a Federal enclave within the State, the Twenty-first Amendment does not apply. *Collins* v. *Yo-*

semite Park & Curry Co., 304 U. S. 518 (1937); *Johnson* v. *Yellow Cab Transit Co.*, 321 U. S. 383 (1944).

In *Collins*, liquor shipments were physically transported across California's territory and into Yosemite National Park, where the liquor was sold and consumed. The Park, although within California's borders, had been ceded to the United States Government. The Court held that "[T]here was on transportation into California 'for delivery or use therein.' The delivery and use is in the Park and under a distinct sovereignty." 304 U. S. at 538.[6]

In the case of "through shipments" of liquor traversing New Jersey for delivery and use in other States, similar analysis appears to place such shipments beyond the reach of the Amendment. *Carter* v. *Virginia*, 321 U. S. 131 (1943) dictum; *Hostetter*, *supra*, 377 U. S. at 331-333; dictum; *Department of Alcoholic Control* v. *Ammex Warehouse*, 224 F. Supp. 546, 554 (9 Cir., 1963) dictum, aff'd. 378 U. S. 124 (1963); c.f. *Duckworth* v. *Arkansas*, 314 U. S. 390 (1941); *Gordon* v. *Texas*, 355 U. S. 369 (1958) per curiam; and see Note, Evolving Scope of State Power Under the Twenty-first Amendment, *supra*, pp. 768-771

The status of such "through shipments" is less clear because in the two loading cases, the Court upheld State

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[6] The Court upheld California's imposition of an excise tax levied upon each unit of liquor sold since the State had reserved direct taxing rights when the Park lands were ceded to the United States. However, it is noteworthy that the imposition of "license fees" for the right to sell such liquor was struck down as an integral part of an attempted regulatory scheme which California was powerless to enforce. It was in connection with this scheme, including the license fees, that the Court considered the Twenty-first Amendment and found it in applicable. 304 U. S. at 533.

regulation as a valid exercise of the police power, Commerce Clause challenges notwithstanding, and expressly declined to consider the applicablity of the Amendment. *Carter, supra*, at 135; *Duckworth, supra*, at 392.[7] Moreover, concurring Justices in each decision relied upon the Twenty-first Amendment. See *Hostetter, supra*, n. 10.

Still, the Amendment clearly was before the Court as a logical basis for the decision in both cases if in fact it applied, and in *Carter*, the majority saw fit to reiterate the "through"-"into" dichotomy established in *Collins*.[8] Indeed, New Jersey seems to concede that at least such "through shipments", without more, are beyond the State's power under the Twenty-first Amendment.[9]

In two recent cases, the Supreme Court has reexamined the reach of the Twenty-first Amendment, this time in re-

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[7] *Duckworth*, involved an Arkansas statute requiring a carrier of liquor to secure a State permit. The Court upheld a conviction for failure to obtain the permit, noting that the defendant was entitled to it merely upon application and that the nominal fee defrayed issuing and inspection costs. *Carter* sustained state regulations of through liquor shipments which required (1) that the most direct route be taken and that the route be described on the bills of lading, (2) listing of the actual consignee [who had to be a lawful recipient] on the bill, and (3) a $1,000.00 bond posted by the carrier.

[8] "It has also been held that shipment through a state is not transportation or importation into the state within the meaning of the Amendment. *Collins v. Yosemite Park Co.*, 304 U. S. 518, 535, 538." 321 U. S. 131, 137.

[9] "The apparent bases of these decisions [*Duckworth* and *Carter*] seems to be that it was necessary to rely upon the police power since there was neither 'distribution' nor 'use' within the states, thus obviating the applicability of the Twenty-first Amendment." Brief for the Defendant, pg. 16.

gard to liquor transactions within the regulating state which involve something more than mere transit through its territory. These cases hold that tax free in bond liquor brought into the State, stored there and then sold for ultimate distribution and use in foreign commerce, all under Federal supervision, is not subject to the Amendment; hence, the State may not use its plenary power under the Amendment to prohibit the traffic, although it may still reasonably regulate it under the police power and within the *confines* of the Commerce Clause. *Hostetter, supra; Ammex Warehouse, supra.*

In *Hostetter*, the Idlewild Bon Voyage Corporation had devised a method of selling tax free liquor to passengers departing New York's Idlewild Airport for foreign destinations. The New York Liquor Authority threatened to close down the business and Idlewild obtained an injunction.[10]

Affirming, the Supreme Court indicated that if the case fell within the line of decision applying the Amendment,

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[10] The mode of operation was as follows: after producing his ticket indicating imminent departure, the customer was allowed to place his order, pay for it, and accept a receipt. Then the liquor, which had been in bond from the moment of entry into New York, was transferred directly to the aircraft under Customs supervision. On board, it was held in custody by the airline, still in bond, and was not delivered over to the customer until he reached his foreign destination. Idlewild conducted these operations pursuant to the Tariff Act of 1930, as amended, and the same Internal Revenue Statutes and Customs Regulations under which Stratford operates as outlined above, supra p. 4.

Idlewild did not have a New York sales license and the New York Liquor Authority had ruled that it was unlicensable under New York law, but could not continue its sales without one. N. Y. Alcoholic Beverage Control Law, §§3(28), 100(1), and 105(2).

New York would be totally unconfined by traditional Commerce Clause limitations. 377 U.S. at 330. However, the Court emphasized that the Twenty-first Amendment and the Commerce Clause, "[L]ike other provisions of the Constitution, *each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case.* Id. at 332. [Emphasis supplied].

New Jersey interprets this to mean that the State's power under the Twenty-first Amendment may be somewhat diminished when the interests protected by the Commerce Clause are sufficiently strong. Brief for the Defendant, p. 22.

On the contrary, we read *Hostetter* as requiring a case by case consideration of the national interests protected by the Commerce Clause, not merely to measure the extent of State power under the Twenty-first Amendment, but rather to determine whether the Amendment applies at all to the liquor in question; in a word, whether the liquor enters New Jersey "for delivery or use therein."

This is made clear by the Court's emphasis on the "ultimate delivery and use" of the liquor sold by Idewild, and by its resolution of *Hostetter* within the *Collins, Johnson, Carter* line of decisions. Reviewing the accomodation of State and Federal interests in *Collins*, where the Court found no importation into the State within the meaning of the Amendment, Mr. Justice Stewart concluded:

> "We may assume that if in *Collins* California had sought to regulate or control the transportation of the liquor there involved from the time of its entry into the State until its delivery at the national park,

in the interest of preventing unlawful diversion into her territory, California would have been constitutionally permitted to do so. [Citing *Duckworth* and *Carter, supra*]. But the Court held that California could not prevent completely the transportation of the liquor across the State's territory for delivery and use in a federal enclave within it.

A like accommodation of the Twenty-first Amendment with Commerce Clause leads to a like conclusion in the present case. Here ultimate delivery and use is not in New York, but in a foreign country. The State has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State. * * * Rather, the State has sought totally to prevent transactions carried on under the aegis of a law passed by Congress [the statutory scheme for tax free in bond liquor] *in the exercise of its explicit power under* the Constitution to regulate commerce with foreign nations. This New York cannot constitutionally do." 377 U.S. at 333. [Emphasis added].

Ammex Warehouse, supra, involved substantially the same constitutional issue as Hostetter. Two California corporations located near the Mexican border proposed to sell tax free liquor to tourists bound for Mexico, with the liquor remaining in bond and under Customs supervision until the customer reached Mexican territory. While the plaintiffs' business had not actually commenced, they had made substantial investments, and the California

Liquor Authority had ruled that their operations would be illegal under California law.[11]

The three judge court reviewed California's regulatory authority both under the Twenty-first Amendment and under the police power; it concluded that the liquor in bond and under Federal supervision remained within the protection of the Commerce Clause. 224 F. Supp. at 555. Finding the reasoning of the District Court in the *Hostetter* case dispositive,[12] it held the proposed transactions beyond the scope of California's Twenty-first Amendment powers:

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[11] The plaintiffs' bonded warehouses, located one mile from the international border, contained a bonded storage area and a display room open to the public. Customers ordered their liquor at the display room, paid for it, and received a receipt. The liquor, which had been continuously in bond from the moment of entry into California, was withdrawn from the warehouse and transported to the U. S. Customs Export official station" at the border. There it was consigned to United States Customs officials for physical delivery to the customer immediately prior to his entry into Mexico. As in *Hostetter*, the withdrawal, transfer, and delivery of the liquor were all accomplished pursuant to the Federal regulatory scheme provided by the Tariff Act of 1930 and under which Stratford now operates. Supra pg. 4.

The California Department of Alcoholic Beverage Control maintained that the proposed sales were unlawful without a State license but the Court found that the plaintiffs' proposed operations were not licensable under any of the alternative licenses available. 224 F. Supp. at 552.

[12] *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 212 F. Supp. 376 (1962). The District Court opinion in *Ammex* came after the New York District Court's decision, but before the Supreme Court affirmed that decision in *Hostetter* v. *Idlewild Bon Voyage Corp.*

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> "We read these cases as holding that a State may *reasonably* regulate interstate or foreign shipments of liquor *for good cause*, and that *where such regulations are reasonable the burden placed on interstate commerce will not require the State regulation to be struck down.* Conversely, however, a State may not prohibit such interstate or foreign shipments." 224 F. Supp. at 557. [Emphasis added.]

Subsequently, the Supreme Court affirmed, per curiam, on the basis of its earlier opinion in *Hostetter*. 378 U. S. 124 (1963).

VI.

Applying the above analysis to the present matter, this Court finds Stratford's operations to be essentially within the same stream of foreign commerce which was emphasized in *Hostetter* and *Ammex*. The transactions in New Jersey are subject to the same Federal supervision of that commerce, and the "ultimate delivery and use" also occurs outside the State. From these basic parallels and from a consideration of the State and Federal interests involved, we conclude that Stratford's activities are similarly protected under the Commerce Clause and similarly beyond New Jersey's power under the Twenty-first Ammendment.

To be sure, there are factual variations among the sales methods employed in each case, but these are not decisive. The imposition of constitutional restraints upon State regulation of commerce turns on the substance of the transaction, not on overly nice distinctions between constructive possession and conditional delivery, or the like. The gist of the matter in all these situations, is that corporations are selling liquor within the State and transferring physi-

cal custody conditioned and controlled by Federal law which destines it for use in foreign commerce. That was why the Commerce Clause applied in *Hostetter* and *Ammex*, that is why it applies with equal force here.[12]

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[12] New Jersey would distinguish the accommodation of the Commerce Clause and the Amendment in the earlier cases on the ground that "[I]n the instant case, not only a solicitation and sale occurs in New Jersey, but there is an actual physical delivery of the alcoholic beverages within this State." Brief for Defendant, p. 22. In regard to *Ammex* this attempted distinction is inaccurate; in any event, it is insubstantial.

In *Hostetter*, the customer made payment and received title to his purchase at the airport. The goods were transferred to the physical custody of the airline and were no longer under Idlewild's control. Nonetheless, since the local interest was preventing diversion and since the transferred liquor still was under Customs supervision, the Court focused on the fact that "ultimate delivery and use is not in New York, but in a foreign country." 377 U. S. at 333.

In *Ammex* there was not only a sale to the ultimate consumer within the State of California, but also a manual transfer to him before he crossed the border. The District Court found this variation immaterial, since the customer thereby received only *"the physical custody of the liquor and [the] possession in a legal sense remains in the Customs agent until the moment the purchaser crosses the border."* 224 F. Supp. at 556. *"If he does not cross the border, the custody may be taken from him."* Id. at 549. (Emphasis added.)

Stratford physically transfers liquor to the shipping lines for distribution to the ultimate consumers on the high seas. Such physical transfer to the passenger carrier also was made in *Hostetter*. But, since Stratford sells to the shipping line, rather than to the consumer, it makes delivery directly to its vendee, as was true in *Ammex*. Neither of these facts sufficed individually to free New York or California from the Commerce Clause, and their coincidence here requires no different result.

(Continued on following page)

Appendix A

The more obvious difference between *Hostetter* and *Ammex*, on the one hand, and the present controversy, on the other, is that New Jersey seeks not to prohibit Stratford's sales, but merely to regulate them. In the defendant's view, the matter ends there. The Supreme Court has indicated that New York or California could regulate such traffic to prevent unlawful diversion; "New Jersey is in exactly that position." Brief for Defendant, p. 20.

We disagree. While they provide constitutional guidance, *Hostetter* and *Ammex* are not fully dispositive because they leave off precisely where the ultimate issue before us begins: Is New Jersey's particular attempt to regulate Stratford an unreasonable burden on foreign commerce which Congress seeks to encourage? This question

(Continued from preceding page)

New Jersey urges that completion of both an intermediate sale and a delivery to someone other than the ultimate consumer takes the liquor out of any continuous process of exportation for use in foreign commerce.

The direct answer to this is that the sale to the carrier is not "completed" in New Jersey, in view of the finding in *Ammex* that legal possession of such bonded liquor remains in the Customs officer until the border is crossed (or, in our case, until the ship sails beyond territorial waters). If the vessel, or aircraft, or pedestrian tourist fails to leave the United States, Customs may reclaim the liquor. More importantly, the liquor's distribution or use in this country remains a Federal offense. The States have no interest in "delivery" as such, but only insofar as such transfers raise the possibility of diversion. *Idlewild* v. *Epstein*, *supra*, 212 F. Supp. at 384. The liquor delivered to Stratford's vendees at dockside is as restricted to foreign use, by passengers and crew, as was the liquor delivered to the airlines in *Hostetter*. In any real sense, then, the liquor must be deemed to be constantly in the stream of foreign commerce.

of how far a State might go in the face of the Federal legislative scheme (short of prohibition) was left open in the two earlier cases since such a determination was not required. Here it is the critical inquiry.[13]

The issue is a narrow one. The Federal scheme does not preempt all State regulation merely because commerce is affected. This possibility was implicitly rejected in *Hostetter*.[14] Nor is there an explicit conflict between the

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[13] "If the State of California sees fit to pass statutes directed toward reasonable regulation of the plaintiffs' business, this will be another case for another day." *Ammex, supra,* 224 F. Supp. at 567.

Far from ignoring the requirement of reasonableness, the dicta in *Hostetter* and *Ammex* both advert to it. Thus, New Jersey may regulate such traffic "to the extent no undue burden [is] placed on interstate or foreign commerce." Id. at 555. In *Duckworth*, the Court summarized: "The Arkansas statute does not forbid or preclude or interfere with the free flow of commerce among the states beyond what is reasonably necessary to protect the local interest in preventing distribution and use of liquor within the State. It does not violate the Commerce Clause." 314 U. S. at 396. Compare the assessment of the burden in *Carter, supra,* at 135. Both discussions are referred to by implication in the *Hostetter* dictum which hypothetically considers State regulation. 377 U. S. at 333, n. 12.

[14] *Hostetter* noted the Congressional exercise of its power over foreign commerce, but made clear that New York was not thereby precluded from all supervision of the liquor even if the liquor is bound by Federal law for foreign use. The requisite clarity of intent to preempt is clearly lacking. "In determining whether state regulation is preempted by federal action, the intent to supersede the exercise by the State of its police powers as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field." *Huron Cement, supra,* at 443.

direction of the Federal and State statutes as such. Rather, the significance of the Federal scheme lies in the fact that it delineates both the local and the national interests which must be weighed in assessing the "reasonable necessity" of the burden imposed by the wholesale license requirement.[15] In other words, the Court must determine whether the burden imposed on foreign commerce, and on the national interest therein, is justified by "the character of the local interests and the available means of protecting them." *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349, 354 (1950); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945),[16]

The local interest is clearly defined. Assertion of the police power over federally supervised liquor in bond is predicated on the danger of diversion; to the extent that it minimizes this danger, the Federal scheme, while not preempting State action, reduces its justifiable scope.

The Tariff and Internal Revenue statutes and the Customs Regulations under which Stratford is already oper-

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[15] New Jersey apparently assumes that any regulation directed toward the matter of diversion is *ipso facto* a reasonable measure and not an undue burden. The fact that a statute is rationally designed to effect a valid objective bears primarily on whether the State has discriminated against interstate commerce. But even in areas of concurrent State and Federal jurisdiction, local statutes may *neither* discriminate *nor* otherwise impose an undue burden on such commerce. See *supra*, p. 13. The first requirement does not concern us here; there is no indication that Section 33:1-11 applies unequally or unevenly to interstate and intrastate trade.

[16] In *Dean Milk*, the Court was weighing an allegedly discriminatory statute against alternative measures available to the city, but the logic applies with equal force in the case of an allegedly unreasonable, though not discriminatory, burden when the national interest involved is sufficiently clear. See *Bibb* v. *Navaho Freight Lines*, 359 U. S. 520 1956); *Southern Pacific* v. *Arizona*, *supra*.

ating are elaborate; indeed, they constitute a maze of regulation. The provisions for supervising physical transfer or delivery of the liquor are particularly detailed, *supra*, p. 4, n. 3. The comprehensive policing covers the entire period for which the liquor is in New Jersey. The Director has "neither alleged nor proved the diversion of so much as one bottle of plaintiffs' merchandise to users within the State of [New Jersey]." *Idlewild* v. *Epstein*, *supra*, 212 F. Supp., at 386.

In this context, the Class B wholesale license applied to Stratford inherently exceeds the limited sphere reserved for State action in regard to such liquor trade. The cases indicate no more than New Jersey's power to oversee the storage and movement of the bonded shipments through her territory. Moreover, those decisions actually approving some regulation involved no comprehensive Federal scheme remotely comparable to that presented here.[17] Yet

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[17] The transportation permits and procedures upheld in *Carter* and *Duckworth* were not only exceedingly limited, they were clearly needed to channel the shipments into known paths and patterns which could be policed. *Duckworth*, *supra*, 314 U. S. at 391 (Oral argument for appellee). In this connection, Mr. Justice Black's concurring remarks in *Carter* are illuminating by way of comparison to the extent of the instant local interest: "Virginia seems to think that, unless adequate precautionary regulations, are devised and enforced, liquor shipments ostensibly being transported through her territory to a neighboring state could be diverted for bootleg purposes contrary to her laws. Such precautionary regulation must come either from Virginia or the federal government. The legislature of Virginia has provided them; Congress has not. This Court could invalidate the Virginia regulations, but only Congress could devise and substitute effective federal regulations to take their place." 321 U. S. at 139. In our case Congress has.

the wholesale license subjects Stratford to the Director's wide ranging power to regulate all aspects of the sales transactions themselves, as well as other facets of its business having little if any relation to the minimal dangers of diversion.[18]

Through cooperation with Customs authorities, New Jersey can obtain considerable information for its own efforts to keep tabs on plaintiffs' local inventories and their disposition. Whatever additional safeguards New Jersey might legitimately require to supplement and corroborate the existing Federal controls could also be accomplished via the less restrictive and less burdensome device of the transport Class D license for which the plaintiffs have applied.

Such a license, issued under N.J.S.A. 33:1-13 and augmented by rules appropriate to its scope, would provide ample authority to permit some supervision of the liquor's

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[18] Section 33:1-11 itself merely states that the Class B wholesale licensee shall operate "subject to rules and regulation . . ." This proviso is implemented by Section 33:1-39 which lists the broad range of subjects over which the Director may issue rules encompassed by each class of license. For the impressive sweep of the Director's powers over, *inter alia*, wholesale transactions and distribution within New Jersey, see *Boller Beverages, Inc.* v. *Davis*, 38 N. J. 138 (1962). "Section 39 * * * then goes on in a second paragraph to specify some 30 detailed categories which general rules and regulations may cover, some of which relate to matters also the subject of specific statutory sections and others of which are not otherwise mentioned in the act, and winds up with sweeping authority to promulgate regulations relating to "practices unduly designed to increase consumption of alcoholic beverages * * * and such other matters as are or may become necessary in the fair impartial, stringent and comprehensive administration of the law." Id. at 151.

transport and transfer until it left the State on board the departing vessels. The fact that Class D licenses would not support regulation of the sales transactions themselves is of no moment; for whatever Stratford's terms of sale, method of solicitation or means of competition, it is the physical movement and storage of the liquor itself which creates the opportunities for diversion. And the physical control would be ensured by the web of Federal and State inspection and custody.[19]

The Federal scheme under which Stratford operates not only delimits the legitimate local concern; it also pinpoints the particular national interest against which that local concern must be balanced.

Here, the national interest is more than the general desirability of freely flowing goods. In the case of liquor sold in bond for shipment and use as ships' stores or at foreign destinations, Congress has spelled out a specific interest by enacting the aforementioned complement of tariff, internal revenue and customs statutes and regulations. It is the expression of Congressional policy embodied therein which concretely indicates the national interest involved.

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[19] Of course, this is not to imply that New Jersey would have carte blanche authority to regulate Stratford in any way it chose even under the Transportation license. We need place no such imprimatur on the Class D permit or the permissible scope of regulations thereunder applicable to Stratford. The validity of the transportation license requirement is not before us since the plaintiffs have agreed to accept one. If its implementation leads to rules applied to Stratford which are challenged as outside the sphere permitted New Jersey by *Hostetter* and *Ammex*, that too will be "another case for another day."

Appendix A

Collectively, these statutes and regulations provide for withdrawal of the liquor from bonded warehouses and for its sale and export, all free of such duties and internal revenue taxes as would normally be imposed. (The exemption from import duties, of course, applies only to liquor previously imported.) Where such taxes and/or taxes have already been paid, the scheme provides for a "drawback" (a refund) thereof upon proof of export in accordance with Federal procedures. 19 U. S. C. §§ 1309, 1313, 1317; 26 U. S. C. §§ 5012, 5062, *supra*.

The supervisory aspects of this scheme, detailed above, are necessary to ensure compliance. But they should not obscure its basic purpose; namely, to encourage and promote such trade by improving the American merchant's competitive position. In short, the entire legislative and administrative apparatus constitutes a Congressional regulation of foreign commerce designed to relieve the liquor of domestic financial burdens which might hinder the merchant's ability to meet foreign competition. *McGoldrick* v. *Gulf Oil*, 309 U. S. 414 (1939); *National Distillers* v. *San Francisco*, 141 Cal. App. 2d 651, 297 P. 2d 61, cert. denied 352 U. S. 928 (1956).

In *McGoldrick*, New York imposed a sales tax on petroleum which the defendant had manufactured from crude oil imported under bond and refined in bonded warehouses in New York. The petroleum was sold for export and use as maritime oil, and the operation was carried on pursuant to sections of the 1930 Tariff Act and the Internal Revenue Code parallel to those involved here, but designed to accord the exemptions to fuel supplies.

The Court did not reach the question of whether the tax constituted a state impose prohibited under the Export-

Import Clause.[20] Rather, it concluded that although they involved a tax exemption, the tariff; internal revenue, and customs regulations, taken together, operated as a Congressional exercise of its power over foreign commerce. Therefore, it voided the state tax on the ground that it would defeat the Federal policy of removing the financial burdens imposed on the importer so that he could compete in the sale of ships' fuel. 309 U. S. at 428.

> "In furtherance of that end, Congress provided for the segregation of the imported merchandise . . . within the state, prescribed the procedure to insure its use for the intended purpose, and by reference confirmed and adopted the customs regulations prescribing that the merchandise while in the bonded warehouse should be free from state taxation.[21] It is evident that the purpose . . . would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress . . . ." Id. at 429.

In *National Distillers*, the *McGoldrick* decision was expressly relied on and applied to liquor in bonded warehouses being held for shipment and use as ships' stores.

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[20] The Court assumed, without deciding, that apart from the Federal bonding scheme, the oil once manufactured would lose any tax free status it might have as an import. Id. at 423.

[21] The Court was referring to Article 942, Customs Regulations of 1932, which expresly exempted bonded goods from state taxation. However, the Court noted that: "The Customs regulations prescribing exemption from state taxation, . . . *states only what is implicit in the Congressional regulation of commerce presently involved.*" Id. at 429. (Emphasis added.)

San Francisco had imposed a personal property tax on the liquor, some of which was imported from abroad and some of which was domestically manufactured but had either been rectified or bottled in Customs bonded warehouses before being shipped to California. All the liquor was shipped, stored and placed on board vessels under the same procedure of continuous Customs control and custody with which Stratford now complies.

The California court followed *McGoldrick*; it held that both liquor imported from aboard and that manufactured domestically were beyond San Francisco's taxing power, even though both had temporarily "come to rest." The opinion examined the closely parallel scheme involved in *McGoldrick* and noted the equally comprehensive regulation of bonded liquor. It concludes as follows:

> "The instant case seems to present a situation that is clearly within the rationale of the Gulf Oil case. Sections 309, 311 and 313 of the Tariff Act of 1930 [19 U. S. C. §§ 1309, 1311 and 1313] provide freedom from internal revenue taxes or for a drawback of taxes paid, when the required procedure is followed for domestic liquors exported, used as ships' stores, or sold to vessels employed in the fisheries. These provisions would seem to constitute regulation of foreign commerce in the instant case just as similar provisions did in the Gulf Oil case.[22] Certainly the purpose of the regulatory scheme is to encourage commerce and give a competitive advantage to these items. If states or their political subdivisions were

[22] The appellate court did not discuss the validity of the tax imposed on liquor which had been manufactured abroad and shipped directly to San Francisco, because the defendant conceded that its remission by the trial court had been correct. 297 P. 2d at 62.

allowed to impose taxes on these items, an interference with this purpose would result." 297 P. 2d at 65.

The District Court in *Amnex* cited both the decision in *McGoldrick* and the reliance upon it in *National Distillers* with apparent approval, but only for the limited proposition that such bonded liquor remains in the stream of foreign commerce and "never becomes part of the common mass of goods in the State." 324 F. Supp. at 546.

Plaintiffs rely on the conclusion in *McGoldrick* and *National Distillers*, but ask us to take that reasoning one step farther. New Jersey's requirement is not a mere revenue measure; it exacts a fixed fee presumably incidental to a regulatory license. Since no direct tax has been imposed on Stratford's liquor or sales, these two decisions do not directly apply. They teach that the purpose of the Federal scheme precludes direct state taxation—whether for revenue, retaliatory or protectionist ends. On the other hand, *Hostetter*, read in the light of the earlier "through shipment" cases, sanctions nominal license fees necessary to defray the costs of reasonable inspection measures. See p. 22, *supra*, n. 13; compare *Carter*, *supra*, 321 U. S. 142 (Frankfurter J., concurring).*

Hence, for plaintiffs' the relevance of *McGoldrick* and *National Distillers* is this: they clearly establish the Federal policy of minimizing public financial burdens incurred

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* Since this is not a case of direct taxation per se, we cannot say that there is a sufficiently direct and explicit conflict between the State and Federal statutes, that the former must fall simply as a contravention of the latter under the Supremacy Clause. See p. 22, *supra*, n. 14.

by those in Stratford's position. Plaintiffs' point is that the wholesale license unduly burdens their foreign commerce precisely because it defeats that policy—and the underlying national interest—more than is reasonably necessary in light of the available alternative.

The difference is not academic. The $200 annual fee for a Class D transportation license would not significantly burden Stratford's trade; the $3,000 annual fee for a Class B wholesale license, payable regardless of Stratford's volume of profit, is another matter. Such a substantial surcharge would have a far more chilling effect on the commerce which Congress sought to foster, thereby undermining the main purpose of the Federal legislation. Thus, the interference with the specific national interest is clear.

New Jersey's argument that the existence of the Federal legislation in no way prohibits concurrent State regulation, Brief for the Defendant, p. 22, misses the point by directing itself only the issue of preemption and ignoring the national interest embodied in the Federal scheme.[24]

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[24] New Jersey first relies on the Federal Intoxicating Liquor Act, 27 U.S.C. §§203, 204, which requires a Federal permit and then conditions that permit upon, *inter alia*, full compliance with State law and the States' exercise of their powers under the Twenty-first Amendment. Since we have already indicated that Stratford does not transport liquor into New Jersey "for delivery or use therein" within the meaning of the Amendment, it is unclear how New Jersey can derive support from Section 204(d).

As for compliance with State law generally, required by Section 204(a)(2), we assume this condition is limited to State laws which are otherwise constitutional. It cannot be used as a bootstrap to cure constitutional infirmities, not based on any notion Congress

(Continued on following page)

Appendix A

To be sure, New Jersey retains wide latitude in the exercise of its police power to regulate matters of local concern even though interstate commerce is incidentally affected; and, as we have noted, this scope is exceptional in the case of intoxicants. And we are aware that courts ordinarily will not second guess a State's choice of means it feels desirable to effect constitutionally legitimate ends.[25]

(Continued from preceding page)

has preempted the field, but found from other legislative expressions of the national interest.

Secondly, New Jersey relies on *Boller Beverages* v. *Davis*, *supra*. In *Boller*, the State Supreme Court ruled that New Jersey might regulate or prevent the use of certain labels and bottle shapes for liquor, despite the fact that they had already been approved by the Federal Alcoholic Administration acting under pertinent Federal statutes and regulations. 26 U.S.C. §5301; 27 U.S.C. §201 et seq.; 27 C.F.R. 5.1 et seq. This case is inapposite for two reasons. First, the attempt to distribute liquor in the challenged packaging within New Jersey was treated as clearly coming under the Twenty-first Amendment and, hence, subject to New Jersey's plenary powers. Second, the Court stressed that the Federal authorization requirement had the limited purpose of protecting Federal revenue, and was neither occupation of the field, nor incompatible with State regulation of the packaging for other purposes. The decision in this regard was no more than an application of the principles applied in *Huron Cement*, discussed *supra*, where the practical impact of the State law did not undermine the Federal purpose.

"If there are alternative ways of solving a problem we do not sit to determine which of them is best suited to achieve a valid State objective." *Bibb* v. *Navajo Freight*, *supra*, 359 U.S. at 524. Still, the statute in *Bibb* was struck down as an unreasonable burden. Both *Southern Pacific* and *Bibb* concerned potential disruption of nationally uniform requirements necessary for efficient railroad or trucking operations. Here, the national interest, while different, is equally clear. The issue is not the best way to achieve the local objective, but rather the possibility of avoiding unreasonable interference with the national interest in the commerce. C.f. *Dean Milk*, *supra*.

Nonetheless, the judiciary, "and not the state legislature is under the commerce clause the final arbiter of competing state and national interests." *Southern Pacific v. Arizona supra*, 325 U. S. at 769. Between the extremes of cases where the State law clearly is or clearly is not impermissible, lies the great spectrum of cases which must be judicially resolved by evaluating the nature and extent of the restraints and burdens imposed. Id. at 768, 770.[26]

Here, examination of all the factors heretofore discussed makes it apparent that the restraint has not been justified. New Jersey has shown no reasonable necessity for the wholesale license requirement to achieve its limited task. We hold that the burden imposed is so substantial, and the ensuing interference with national policy so clearly avoidable, that the application of N.J.S.A. 33:1-11 to Stratford must fall as an impermissible restraint on foreign commerce. We concur with the plaintiffs that such a requirement is defective both in that it imposes the undue burden we have just examined and that it subjects Stratford to inherently excessive State regulation.

VI.

The plaintiffs also challenge the wholesale license requirement as a violation of the Export-Import clause of the United States Constitution. Article I, Section 10, Clause 2 provides that:

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[26] "But to let each locality conjure up its own dangers and be the judge of the remedial restrains to be clamped onto interstate trade inevitably retards our national economy and disintegrates our national society." Jackson, J., concurring in *Duckworth, supra*, 314 U. S. at 401.

"No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, *except what may be absolutely necessary for executing its inspection laws.*" (Emphasis added).

Generally, the States may not interfere with the Federal power over exports and imports while the goods are still in the course of foreign commerce. *Texas & New Orleans R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111 (1913); and taxes thereon are invalid. *Department of Revenue* v. *James Beam Co.*, 377 U. S. 341 (1963).

In the *Beam* case, the Kentucky Court of Appeals had found that the state license tax, which involved a fixed payment per bottle of liquor brought into the State from abroad, was in fact a tax on imports. The Supreme Court concurred and struck down the tax on the ground that the Twenty-first Amendment does not permit "what the Export-Import Clause precisely and explicitly forbids." 377 U. S. at 344.

In *Hostetter*, the Supreme Court dismissed the Export-Import Clause as irrelevant to New York's complete prohibition of the challenged business. 377 at 327, n. 3. In *Ancker*, although complete prohibtion was at issue, the District Court did discuss the Export-Import Clause, in connection with the liquor's "in bond" status. See p. 19, *supra*. But that Court did not clearly indicate what part, if any, the Clause played in the final result; the decision seemed to follow the lower court in *Hostetter* and rely solely on the Commerce Clause.

Here the goods are also in bond and held for export. However, neither an ad valorem tax, nor a complete prohibition is involved, but only a regulatory inspection meas-

ure and license fee. Hence, even if the liquor held for sale and delivery by Stratford is deemed an import or export within the protection of the Export-Import Clause, and further assuming the licensee fee can fairly be considered an impost or duty, it would still remain to interpret the exception to that Clause which permits even imposts or duties where they are "absolutely necessary to execute the State's inspection laws." *C.f. Beam*, 377 U. S. at 345.

We refrain from passing on any of these questions since we find no issue raised by the defendant's contentions that cannot be resolved under the Commerce Clause on which the plaintiffs have placed primary reliance. Moreover, the last mentioned question would involve similar considerations to those we have already examined in Part V. of this opinion.

Accordingly, this Court will enjoin the State of New Jersey from enforcing or attempting to enforce Section 33:1-11 of the New Jersey Alcoholic Beverage Control Law. Counsel for the plaintiffs shall submit, on notice to the defendant, an appropriate order.

JUDGMENT

This matter being presented to the Court on the adjourned return day of an Order to Show Cause issued on April 13, 1965, for relief pursuant to sections 2281 and 2284 of Title 28, U. S. C., to enjoin the enforcement against the business of the Plaintiffs, of certain provisions of the New Jersey Alcoholic Beverage Law, N.J.S.A. 33:1-11 to 33:1-96, and this matter and the trial of the action having come on to be heard on a stipulation of facts in the presence of Max Mehler, and Harold H. Fisher of Shanley and Fisher, for the Plaintiffs, and Hon. Arthur J. Sills, Attorney General of New Jersey by Joseph A. Hoffman, Esquire, Deputy Attorney General of New Jersey, for the defendant,

and the Court having heard and considered the facts as stipulated and the argument of counsel and briefs submitted and having filed an opinion on December 14, 1966, wherein this Court has determined that New Jersey does not have the right to require the Plaintiffs to obtain a wholesale liquor license in order to engage in the sale and delivery of in-bond tax-free liquor to vessels docked in New Jersey for use in foreign commerce, and that such a requirement, as applied to the Plaintiffs, is unconstitutional, and it appearing to the Court that the Plaintiffs are entitled to the relief demanded in the Complaint filed herein,

IT IS HEREBY ADJUDGED and ORDERED as follows:

A) That as applied to the Plaintiffs, N.J.S.A. 33:1-11 is unconstitutional and void as being contrary to Article I, Section VIII, Clause 3 of the Constitution of the United States.

B) That the Defendant, his officers, agents, servants, employees, attorneys and all persons acting in concert or participation with them, are enjoined and restrained from enforcing or attempting to enforce against the Plaintiffs, either by invoking or attempting to invoke its civil or criminal sanctions or otherwise, the provision of R.S. 33:1-11 of the Alcoholic Beverage Control Law of the State of New Jersey.

J.D.C.

I hereby consent to the entry of the above order as to form.

ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

By: JOSEPH S. HOFFMAN

Assistant Attorney General

APPENDIX B

Letter from the Acting Director of the Division of Alcoholic Beverage Control Denying to Appellees a Plenary Wholesaler's License Without Restriction

[Alcoholic Beverage Control Bulletin 1565]

September 30, 1963

MAX MEHLER, Esq.
Newark 2, N. J.

This acknowledges your communications of September 27, 1963, enclosing application with deposit fee of $2,276.71, of Louis L. and Joseph E. Epstein, t/a Stratford International Tobacco Co., for a plenary wholesale license.

You state that your clients are unwilling to accept the license if made subject to the condition (viz., "That no sales of alcoholic beverages will be made in New Jersey under this license except only such sales as are made in bond to steamship companies to become part of ships' stores for use beyond the jurisdiction of this state") expressed in my Conclusions of August 19, 1963, following a hearing upon their then application for a 1962-63 plenary wholesale license. *Re Epstein*, Bulletin 1538, Item 4. You request my immediate determination with respect to the current 1963-64 application in view of your clients' expressed declination of license with such condition.

It is my determination, based upon the record developed at the previous hearing, that no public need has been established for issuance of a plenary wholesale license without limiting condition to your clients and, hence, in view of their unwillingness to accept such license with condition, you are advised that their application for 1963-64 license is hereby denied.

Very truly yours,

EMERSON A. TICHURT
Acting Director.

APPENDIX C

Unreported Decision of the Appellate Division of the Superior Court of the State of New Jersey Upholding the Acting Director's Determination

[A-89-63; A-168-63, May, 1964]

Argued April 27, 1964—Decided May 21, 1964.

Before Judges Conford, Freund and Sullivan.

Mr. Max Mehler argued the cause for appellants.

Mr. Samuel B. Helfand, Deputy Attorney General argued the cause for respondent (*Mr. Arthur J. Sills*, Attorney General of New Jersey, attorney).

Per Curiam

Plaintiffs appeal from an adverse ruling by the Division of Alcoholic Beverage Control.

Plaintiffs have been tobacco merchants for many years. About three years ago they expanded their operations to include the sale of tax free tobacco to ships in the Port of New York. However, they ascertained that this kind of business is "precarious" unless they can also sell tax free liquor in bond to ships, since purchasing agents prefer to buy both items from the same source of supply.

In March 1963 plaintiffs applied to the Division for a plenary wholesale liquor license for the 1962-1963 license year expiring June 30, 1963. The Alcoholic Beverage Control Act does not provide for a special license for sale of tax free liquor in bond. Such sales may be made under a plenary wholesale license of which some seventy-five have been issued in this State. Along with the application plaintiffs filed a statement in which they stated that they

intended to engage only in the sale of tax free liquor in bond to ships in the Port of New York.

At the hearing on plaintiffs' application on June 6 and 7, 1963, plaintiffs showed that one wholesaler supplies virtually all tax free liquor to steamship lines and vessels sold in bond in the New Jersey area of the Port of New York. This wholesaler operates under a plenary wholesale license subject to the condition that no sales of alcoholic beverages will be made in New Jersey under such license except such as are made in bond to steamship companies to become part of ships' stores for use beyond the jurisdiction of this State.

The Acting Director (Director) held that there was a public need or necessity to have an additional wholesaler in this area of the alcoholic beverage business. Therefore he granted plaintiffs' application for a plenary wholesale license subject, however, to the same condition imposed on the other licensee. The Director's conclusions were filed on August 19, 1963, some fifty days after the license being applied for would have expired.

On the basis of the Director's ruling granting their application, plaintiffs in September 1963 applied for a plenary wholesale license for the 1963-1964 license year and at the same time notified the Director that they were of the opinion that they were entitled "to an unrestricted plenary wholesale license without any limitations or conditions" and that they were unwilling to accept a license subject to the condition set forth in the Director's conclusions.

By letter dated September 30, 1963, the Director notified plaintiffs that "based upon the record developed at the previous hearing, . . . no public need has been established for

issuance of a plenary wholesale license without limiting condition." The application for 1963-1964 license was therefore denied.

Plaintiffs' sole contention on this appeal is that a plenary wholesale license is provided for by statute and that the Director having determined that plaintiffs were entitled to a plenary wholesale license, had no power to impose a limitation on the scope of such license.

Actually the ruling on the 1962-1963 application is moot. However, the Director based his ruling on plaintiffs' 1963-1964 application on the evidence produced at the hearing on the first application. Plaintiffs have not challenged this procedure nor do they suggest that they have other or additional evidence to offer.

We find it unnecessary to decide whether the Director may lawfully impose conditions or limitations on the use of a liquor license. But see *Board of Commissioners of the City of Bayonne* v. *B & L Tavern, Inc., et al.*, 42 N. J. 131 (1964). Suffice it to point out that plaintiffs did not attempt to show that there was a public need or necessity for another plenary wholesale license as such. Plaintiffs misstate the Director's conclusion as to the public need for a license. All that the Director said was that there was a need for an additional license in the particular area of sales of tax free liquor in bond to ships' stores. Since plaintiffs' present application was for a plenary wholesale license "without any limitations or conditions", and the Director found no need for such a license to have been established, he properly denied plaintiffs' application.

Affirmed.

APPENDIX D

Order of the Director of the Division of Alcoholic Beverage Control Denying Appellee's Application for a Limited Transportation Permit

[Alcoholic Beverage Control Bulletin, No. 1507, November, 1964]

IN THE MATTER

OF

an Application by LOUIS L. & JULIUS EPSTEIN t/a Stratford Tobacco Company, 504 Clinton Avenue, Newark, New Jersey for a Limited Transportation Permit.

Max Mehler, Esq., attorney for applicants.

Richard C. Gossweiler, Esq., and *David S. Piltzer*, Esq., appearing for the Division of Alcoholic Beverage Control.

BY THE DIRECTOR:

The Hearer has filed the following Report herein:

Hearer's Report

Louis L. Epstein and Julius Epstein, t/a Stratford International Tobacco Company, 504 Clinton Avenue, Newark, New Jersey filed an application for a Limited Transportation Permit and a hearing was held in this Division to determine the following:

(1) Whether, under the facts in this case, such permit could be legally granted to them.

(2) Whether the Director, in the exercise of his discretion, should grant the said application.

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The applicant is a partnership engaged in the wholesale tobacco business, a substantial part of which involves sale to ships at the New Jersey piers. Heretofore, they applied for a wholesale license pursuant to R.S. 33:1-11.1 upon their representation that they intended to sell alcoholic beverages to ships docked at the New Jersey piers for consumption beyond the territorial limits of the United States. The Division expressed a willingness to grant such license to cover such tax-free activity but the applicants refused to accept a limited license and insisted upon a license without restrictions or conditions. The Director refused to issue an unconditional plenary wholesale license. *Re Epstein*, Bulletin 1565, Item 3. His action was appealed to the Appellate Division of the Superior Court which affirmed the position of the Director with respect to the granting of a limited license. (Opinion not approved for publication—see Bulletin 1565, Item 4.)

Notwithstanding their refusal to accept such license, the applicants, by stipulation at this hearing, have admitted that they have solicited in New Jersey by telephone and by letter, and do not deny that they also solicited in person, the sale of tax-free liquor to such ships docked at the New Jersey piers. The applicant has been licensed by the Federal government to engage in this kind of operation and there have been submitted into evidence permits issued by the Federal government setting forth applicants' authority to engage in such activity.

They now seek a Limited Transportation Permit, acting as expressed by their counsel, "out of an abundance of caution, because I am not certain whether the New Jersey statute is broad enough to require us to have a Transportation License. I feel that we would be on the safer

side if we were to apply for and obtain this transportation license which we are now asking the Division to grant to us."

Counsel for the applicants advocates that the present activity of the applicants in soliciting the sale of tax-free alcoholic beverages to New Jersey ships for consumption beyond the jurisdiction of the United States, is not unlawful and could not be declared unlawful by New Jersey statutes; and that since the solicitation or sale of these alcoholic beverages could not be prevented as it would constitute an interference with interstate commerce and commerce with foreign nations, it must follow, therefore, that the refusal to grant a Limited Transportation License would similarly be an abridgement of the applicants' constitutional rights and an interference with Federal regulation of commerce.

R.S. 33:1-2 declares any sale of alcoholic beverages in New Jersey unlawful unless made pursuant to a license first obtained. Under the broad definition of "sale" in R.S. 33:1-1 (w) the applicants' solicitation and deliveries made pursuant to orders received by reason of such solicitation is unlawful unless engaged in and pursuant to a license first obtained. It is thus clear that every commercial transportation of alcoholic beverages within the State must be licensed. R.S. 33:1-2. The Alcoholic Beverage Law "is intended to be remedial of abuses inherent in liquor traffic and shall be liberally construed." R.S. 33:1-73.

As the Court stated in *Boller Beverages, Inc.* v. *Davis*, 38 N. J. 138, 150 (1962):

> "In considering the question presented, it is important to have in mind the purposes of alcoholic

beverage regulation in this State and the scheme of control which has been set up to carry out those policies. And in this field, one always starts with the proposition that the business, so prone to evils, is one not of right and is peculiarly subject to strict governmental control in every phase. Therefore the authority to regulate is broadly said to be practically limitless."

Franklin Stores Co. v. *Burnett*, 120 N. J. L. 596, 598 (Sup. Ct. 1938); *Hudson Bergen County Retail Liquor Stores Association* v. *Hoboken*, 135 N. J. L. 502, 503 (E. & A. 1947); *Mazza* v. *Cavicchia*, 15 N. J. 498, 505-506 (1954); *X-L Liquors* v. *Taylor*, 17 N. J. 444, 449 (1955); *Fanwood* v. *Rocco*, 33 N. J. 404, 411-412 (1960).

The object of State Regulation is "to promote temperance and eliminate the racketeer and bootlegger," N.J.S.A. 33:1-3, and it "is intended to be remedial of abuses inherent in liquor traffic and shall be liberally construed," R.S. 33:1-73. Thus these purposes have quite a different orientation from those underlying Federal regulation. The power of the Statute enables the Director to effectively carry out his duty "to supervise the manufacture, distribution and sale of alcoholic beverages in such a manner" as to accomplish the objects of the law. N.J.S.A. 33:1-3.

Finally, it should be noted that the Act is intended to insure the payment of State alcoholic beverage excise taxes. R.S. 33:1-17, 31 and 35.

Counsel, however, advocates that the recent case of *Hostetter* v. *Idlewild Bon Voyage Liquor Corporation* (U.S. Sup. Ct. #116, October term 1963; decided June 1, 1964)

"holds that a state may not prevent commerce with foreign nations and thus may not interfere with the sale of tax-free liquor for foreign consumption".

My examination of this case convinces me that the factual complex therein is substantially different from that presented in the case *sub judice* and thus, based on the applicable principles, the result must be different.

In the *Hostetter* case, the Idlewild Bon Voyage Liquor Corporation was engaged in the retail business of selling bottled wines and liquors to departing international airline travelers at the John F. Kennedy Airport in New York. Its place of business was leased from the Port Authority for use solely as an office in connection with the sale of in-bond wines and liquors.

New York has no law providing for the licensing of appellee's activities at the airport, and thus, it sought to prohibit entirely the sale of tax-free alcoholic beverages for use abroad. The Court properly held that it could not do so since Federal Law permitted such activity. The Court, however, stated that New York "has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State "Rather, the State has sought *totally to prevent* transactions carried on under the aegis of a law passed by Congress in the exercise of the explicit power under the Constitution to regulate commerce with foreign nations. This New York cannot constitutionally do."

In its supportive argument, the Court cited the case of *Collins et als.* v. *Yosemite Park & Curry Company et al.*, 304 U. S. 518, for the proposition that California could not

"prevent the shipment into and through her territory of liquor destined for distribution and consumption in a national park". It went on to say:

> "We may assume that if in *Collins* California had sought to regulate or control the transportation of the liquor there involved from the time of its entry into the State until its delivery at the national park, in the interest of preventing unlawful diversion into her territory, California would have been constitutionally permitted to do so. But the Court held that California could not prevent completely the transportation of the liquor across the State's territory for delivery and use in a federal enclave with it."

In the instant case, New Jersey does have a law which specifically governs the licensing of wholesale activity and the transportation thereof from and through this State into foreign commerce. Thus, it is undebatable that New Jersey, as distinguished from New York, has not sought to "prevent completely" the sale of alcoholic beverages by the applicants, but has, instead, attempted to control and regulate such activity by requiring them to obtain a wholesale license pursuant to R.S. 33:1-11.1. The applicants surely cannot deny this since they have already applied for such license, and the Division has expressed a willingness to grant such license to cover the tax free activity which is involved herein.

In short, New Jersey is not delimiting, in the slightest measure, any of the activity granted to the applicants through its Federal permits and authority. They are permitted to sell and to transport provided they obtain licenses from New Jersey to do so. Since, however, they have re-

fused to obtain the appropriate license to engage in the solicitation and sale of tax-free beverages, it would be ludicrous to argue that they should be permitted to transport such beverages in order to enable them to engage in such activity proscribed with proper license.

With further respect to the general concept of regulation, both local and Federal, such regulation has been clearly delineated in a number of decisions of the U. S. Supreme Court. As Mr. Justice Black expressed it, in his concurring opinion in *Carter et al.* v. *Virginia*, 321 U. S. 131, 137, 64 S. Ct. 464, 88 L. ed. 605, 612 (1944), "Though the precise amount of power [the 21st Amendment] has left in Congress to regulate liquor under the Commerce Clause has not been marked out by decisions, this much is settled: local, not national, regulation of the liquor traffic is now the general Constitutional policy."

As the Court stated in *Ziffrin* v. *Reeves*, 308 U. S. 132, 60 S. Ct. 163, 84 L. ed. 128:

> "(a state) may adopt measures reasonably appropriate to effectuate (transportation and sale of intoxicants), and exercise full police authority in respect to them."

This concept was expressed in *U. S.* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 65 S. Ct. 661, 89 L. Ed. 951 (1945) as: "the state's full authority to determine the conditions upon which liquor can come into its territory and what will be done with it after it gets there * * *".

In other words, as Justice Frankfurter expressed in Frankfort, "The Twenty-First Amendment reversed this legal situation by subordinating rights under the Commerce

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Clause to the power of a State to control, and to control effectively, the traffic in liquor within its borders." (324 U. S., at p. 300, 65 S. Ct., at p. 665, 89 L. Ed., at p. 957).

Thus, as stated hereinabove New Jersey did not reduce the privileges conferred by the Federal authority, but merely seeks to control and to regulate the passage of intoxicants within its borders in the interest of preventing its unlawful diversion into the internal commerce of the State. This is its responsibility, obligation and right under the Alcoholic Beverage Law. R.S. 33:1-1 (*et seq.*).

Even though the exercise of such powers may "greatly affect interstate commerce", (*Boller Beverages, supra* at p. 148), it is unthinkable that the Division should be required to issue a transportation permit to aid the applicants to engaged in unlicensed sales of alcoholic beverages in violation of the State Alcoholic Beverage Law.

There is one further matter that was developed at the hearing. Testimony was adduced by the Division to the effect that the applicants hindered, delayed and failed to facilitate and cooperate with an investigation of the alleged sales of alcoholic beverages by the applicants to various ships at the New Jersey piers. The purpose of this testimony was to enable the Director to determine whether or not, if the same were proved, he should exercise his discretion in refusing to issue such transportation permit.

There is also reflected in the record the fact that the applicant has engaged in solicitation and sale of the alcoholic beverages as above mentioned without obtaining the requisite licenses and permits from this Division. It is apparent from this that the applicant did not exercise the "abundance of caution" suggested by his counsel. This,

too, is a matter which must be taken into consideration by the Director in his determination as to whether or not to issue the applied-for permit.

However, in view of my resolution of the legal issue considered in the first part of this report, it is unnecessary to consider such testimony, and make any recommendation with respect thereto.

Accordingly, it is recommended that an Order be entered denying the application of applicants for the issuance of a Limited Transportation Permit.

Conclusions and Order

Written exceptions to the Hearer's Report and written argument in support thereof have been filed with me by the applicants. Additionally, I heard oral argument on such exceptions.

The principal contention of the applicants is that the Hearer is in error in his finding that "New Jersey does have a law which specifically governs the licensing of wholesale activity and the transportation thereof from and through this State into foreign commerce", which law (R.S. 33:1-11 (1)) the Hearer found is applicable to applicants' sales to ships docked at New Jersey ports of tax-free alcoholic beverages, for consumption beyond the jurisdiction of New Jersey.

First, it should be noted that a limited transportation permit, issuable under Rule 7 of State Regulation No. 18, does not encompass the specific type of transportation in which the applicants, as appears from the record herein, intend to engage, namely, delivery of tax-free alcoholic beverages *from* bonded warehouses *in* New Jersey to ships

docked at New Jersey ports. A transportation license, issuable under R.S. 33:1-13, would cover such type of activity.

Accordingly, the application might well be denied without any need for discussing the question whether the applicants intend to utilize the permit in furtherance of unlawful unlicensed sales of alcoholic beverages. However, since the applicants may, in fact, desire to engage in other transportation activities covered by the permit, or they may contemplate applying for a transportation license, I will take up their exceptions at this time rather than await the filing of a new application.

At the hearing herein the applicants, through counsel, stated "that it is the intention of the applicant to sell tax-free alcoholic beverages to ships that are berthed in New Jersey for foreign travel and for use beyond the territorial limits of the United States; that the solicitation will take place in New Jersey." It thus becomes pertinent to inquire whether such intended sales, including the solicitation thereof, could permissibly be made without any New Jersey license. The Hearer has concluded that such unlicensed sales are unlawful and that such State interdiction is not in conflict with federal law as interpreted by the above cited *Hostetter* case. With this I agree.

R.S. 33:1-11 (1) presently provides:

"Plenary wholesale license. 1. The holder of this license shall be entitled, subject to rules and regulations, to sell and distribute alcoholic beverages to retailers and wholesalers licensed in accordance with this chapter, *and to sell and distribute without this State to any persons pursuant to the laws of the*

places of such sale and distribution, and to maintain a warehouse and salesroom; provided however, that the delivery of such alcoholic beverages by the holder of this license to retailers licensed under this Title shall be from inventory in a warehouse located in New Jersey which is operated under a plenary wholesale license. The fee for this license shall be $3,000.00." (Italics added.)

When the State alcoholic beverage law was originally adopted in 1933, the section providing for a plenary wholesale license did not contain the above italicized words (nor the proviso covering warehouse inventory, which was enacted on August 19, 1964). However, in 1934 the Control Act was amended to include a new section 12 (3) (later revised as R.S. 33:1-11.3 and subsequently repealed by P.L. 1942, c. 158), which provided for a plenary *export* wholesale license, the privileges of which were identical to those of the present plenary wholesale license (except with respect to the warehouse inventory proviso). Question thereafter arose as to the construction of the language "and to sell and distribute without this State to any persons pursuant to the laws of the places of such sale and distribution."

In Bulletin 341, Item 4, the late Commissioner Burnett ruled on August 4, 1939 that sales to unlicensed fishing boats, while docked at New Jersey piers, of alcoholic beverages for consumption in waters beyond the jurisdiction of New Jersey were "out-of-State sales." He further stated, "The only wholesale licenses which authorize out-of-State sales are the plenary and limited export wholesale licenses." (The limited export wholesale license provided the same privileges as the plenary one but was con-

fined to certain types of alcoholic beverage.) In such bulletin item Commissioner Burnett specifically construed the phrase "sell and distribute without this State to any persons pursuant to the laws of the places of such sale and distribution" to include such out-of-State sales to fishing vessels. See also Bulletin 97, Item 3 and Bulletin 290, Item 15 for background to Commissioner Burnett's construction of the statutes in question.

This construction has been consistently followed ever since by my predecessors and is the Division's current interpretation of R.S. 33:1-11(1), as amended to its present form. The applicant nevertheless argues that the phrase in question is intended "to permit a wholesaler to sell not only to wholesalers in New Jersey but as well to sell to licensed wholesalers or retailers outside of the State of New Jersey if their laws permit them positively to . . ." Thus applicant contends sales to ships docked in New Jersey for extra-territorial consumption would not be covered by the statute unless the ships held wholesale or retail licenses issued by the place of ultimate distribution. In other words, the mere absence of any prohibitory law in such other jurisdiction would not bring such sales within the scope of the statute as being made "pursuant to law." Presumably, under such construction, sales to *unlicensed* ships therefore could lawfully be made by no one under State law. R.S. 33:1-2. In such event, applicants argue, State law would bow to federal law under the *Hostetter* case and then everyone, including the applicants and New Jersey licensed wholesalers, could engage in such activity.

I am not persuaded by such reasoning. Rather, I find that "pursuant to the laws of the places of such sale and distribution" means provided that the laws of the places

of such sale and distribution do not prohibit such activity. For example, a New Jersey licensed wholesaler could not solicit in New Jersey to sell alcoholic beverages to an unlicensed buyer who intended to distribute the alcoholic beverages in a "dry" State or in a "State requiring a license and in which he does not hold such license. If the Legislature intended applicants' construction, it could easily have inserted the word "licensed" before the words "pursuant to the laws of the place of such sale and distribution."

In the exceptions filed herein applicant has cited the recent case of *Ammex Warehouse Co.* v. *Department of Alcoholic Beverage Control,* 224 F. Supp. 546 (Dist. Ct., Calif., 1963), affirmed by the United States Supreme Court on June 15, 1964, in a memorandum decision, 12 L. ed. 2d 743, for the proposition that New Jersey's licensing law does not fit the applicants' activity. While it is true that this case held that California's law did not cover the sales to consumers being made by the plaintiff therein, the decision necessarily turned on California's statutes, which differ materially from New Jersey's. I have read the *Ammex* case and find nothing of assistance in determining whether New Jersey's statutes fit applicants' activities.

Under the circumstances, after carefully considering the entire record herein, I shall deny the application.

Accordingly, it is, on this 23rd day of November 1964,

ORDERED that the application of the applicants for the issuance of a limited transportation permit be and the same is hereby denied.

JOSEPH P. LORDI
Director

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 322

JOSEPH P. LORDI, Director of the Division of Alcoholic Beverage Control of the Department of Law and Public Safety of the State of New Jersey,

Defendant-Appellant,

vs.

LOUIS J. EPSTEIN and JULIUS EPSTEIN,
t/a Stratford International Tobacco Co.,

Plaintiffs-Appellees.

On Appeal from the United States District Court
for the District of New Jersey

APPELLEES' MOTION AND BRIEF FOR AFFIRMANCE UNDER RULE 16

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FIRST POINT—Under repeated decisions by this and other courts, the Twenty-First Amendment does not govern.

The appellees' business in tax-free bonded liquors for export under federal statutes, regulations, license and supervision throughout, does not entail transportation of intoxicating liquors for "delivery or use" within New Jersey within the meaning of the Amendment. As said below, the liquors are continuously "in the stream of foreign commerce" serving national policies and interests which predestine the liquors for use outside the United States 7

SECOND POINT—Since settled constitutional law excludes New Jersey's right to forbid the appellees' federally licensed business in foreign commerce by reason of what the Jurisdictional Statement terms (p. 16) "the plenary power of the State under the Twenty-First Amendment," New Jersey cannot by indirection jeopardize the appellees' business and the specific national policies and objectives for which it is federally licensed by imposing conditions not clearly and reasonably confined and directed to the narrow purpose of protecting New Jersey against diversion of the bonded liquor while in transit under full federal supervision and federal policing against diversion.

New Jersey's refusal of a Class D "transportation license" for which the appellees had applied, and its insistence on application for and obtaining a Class B "plenary wholesale license" as a condition of legality, clearly exceeds the limited sphere reserved for state action in regard to such liquor business conducted solely in foreign commerce and under and in accordance with the national constitutional power to regulate foreign commerce in the national interest 12

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Defendant-Appellant,

vs.

LOUIS J. EPSTEIN and JULIUS EPSTEIN, t/a Stratford International Tobacco Co.,

Plaintiffs-Appellees.

On Appeal from the United States District Court for the District of New Jersey

APPELLEES' MOTION AND BRIEF FOR AFFIRMANCE UNDER RULE 16

The appellees move for summary affirmance on the ground that the questions on which the decision of the cause depends are manifestly so unsubstantial as not to need further argument.

The plaintiffs brought this action pursuant to Sections 2281 and 2284 of Title 28, U.S.C., to enjoin the threatened enforcement against their business of certain provisions of

the New Jersey Alcoholic Beverage Law, N.J.S.A. 33:1-96. The complaint sought a determination that the statute, as applied, is repugnant to the Commerce, Export-Import, and Supremacy Clauses of the United States Constitution. General jurisdiction is founded upon 28 U.S.C. §1331, a matter in controversy exceeding $10,000.00, and arising under the Constitution and laws of the United States.

The defendant-appellant, who directs New Jersey's Division of Alcoholic Beverage Control, had ruled that the plaintiffs' operations in foreign commerce in wines and liquors are illegal in the absence of acquiring a "plenary wholesale license". His ruling was and is supported by New Jersey's Attorney-General.

The plaintiffs' operations in foreign commerce are conducted pursuant to license, control and supervision of the United States Government under the Tariff Act of 1930, the applicable provisions of the United States Revenue Code, and pertinent regulations thereunder. The federal regulations are elaborately designed to prevent diversion.

New Jersey does not assert that there has in fact been any diversion of the liquor, or any violation or ignoring of any part of the comprehensive federal scheme of regulations and inspections designed to prevent diversion. Nor does New Jersey assert that the federal scheme is inadequate or is not strictly enforced.

The complaint and answer in the action have been filed with this Court by the appellant.

The "Questions Presented" in the Jurisdictional Statement (p. 4) are in essence whether the State of New Jersey may constitutionally ban as illegal the appellees' business unless they acquire "a plenary wholesale license," pursuant to N.J.S.A. 33:1-11.

The pertinent facts have been stipulated by the parties. The Jurisdictional Statement concedes (p. 5) that they "are not in dispute."

The court below granted the injunction prayed. Its unanimous opinion and judgment are attached to the Jurisdictional Statement as Appendix A (p. 1a), and are officially reported in 261 F. Supp. 921.

The appellees adopt the following unanimous statement below in summarizing the preceding decisions by this Court and their controlling effect here (261 F. Supp. 921, 935; Jurisdictional Statement, p. 21a):

> "Applying the above analysis to the present matter, this Court finds Stratford's operations to be essentially within the same stream of foreign commerce which was emphasized in Hostetter (377 U. S. 324) and Ammex (378 U. S. 124). The transactions in New Jersey are subject to the same Federal supervision of that commerce, and the 'ultimate delivery and use' also occurs outside the State. From those basic parallels and from a consideration of the State and Federal interests involved, we conclude that Stratford's activities are similarly protected under the Commerce Clause and similarly beyond New Jersey's power under the Twenty-first Amendment.
>
> "To be sure, there are factual variations among the sales methods employed in each case, but these are not

decisive. The imposition of constitutional restraints upon State regulation of commerce turns on the substance of the transaction, not on overly nice distinctions between constructive possession and conditional delivery, or the like. The gist of the matter, in all these situations, is that corporations are selling liquor within the State and transferring physical custody conditioned and controlled by Federal law which destines it for use in foreign commerce. That was why the Commerce Clause applied in Hostetter and Ammex, that is why it applies with equal force here."

The Facts

The court below in its opinion made the following accurate summary of the stipulated facts (261 F. Supp. at 927; J. S. at 3a):

> "The pertinent facts have been stipulated by the parties; the remaining determinations are issues of law. Plaintiffs conduct their business as a partnership under the name Stratford International Tobacco Co. [Stratford] from 504 Clinton Avenue, Newark, New Jersey, which premises are not licensed by the State.
>
> "Stratford's operations are carried on pursuant to Federal importer's and exporter's basic permits which authorize it to import in-bond liquor into the United States and to sell, deliver and ship such liquor in interstate and foreign commerce. Stratford also holds a license and its drivers are bonded and hold identification cards, all issued by the Bureau of Customs, which authorize its drivers to transport in-bond liquor in Stratford's trucks.
>
> "Liquor imported by Stratford enters the Port of New York or the Port of New Jersey [a division of

the Port of New York area], where it is consigned to the custody and care of the Collector of Customs. In addition to importing liquors from abroad, Stratford also purchases in-bond liquor from bonded distilleries in the United States, which is delivered by bonded carrier into bonded warehouses in New Jersey.

"All the liquor, whether imported or domestic, is brought into New Jersey by Stratford solely for export. As such, the liquor is constantly subject to the control and custody of the United States Treasury Department, Bureau of Customs or Bureau of Internal Revenue, from the moment of entry into the state until its ultimate release for consumption in foreign commerce. The control is effected through a comprehensive scheme of regulation and inspection procedure pursuant to Sections 309, 311 and 317 of the Tariff Act of 1930, as amended, 19 U.S.C. §§1309, 1311 and 1317, related portions of the Internal Revenue Code, as amended, 26 U.S.C. §§5012, 5062 and Treasury Regulations promulgated by the Bureau of Customs, 19 C.F.R. parts 8, 12, 18, 19, 21, 23 and 25."

In the margin the court below added the following as also the stipulated facts (261 F. Supp. at p. 927; J. S. at 4a):

"Upon arrival of the imported liquor consigned to the Collector of Customs, Stratford receives a notice of arrival, bills of lading, and various certificates. The liquor is then carried to a United States Customs bonded warehouse in a bonded truck owned by Stratford, or by a bonded common carrier and, in either event, a vehicle licensed by the Customs for such carriage. The warehouse itself is under the jurisdiction and control of the Federal Government.

"Once stored, the liquor may only be withdrawn and delivered pursuant to an equally rigorous policing

system. Sales orders are solicited by phone, by mail or in person either at shipping line offices or directly from ship officers at dockside. To withdraw ordered liquor, Stratford obtains a permit with several copies from the Customs office in Newark. The copies are delivered to the customs inspector at the warehouse. He retains a copy and gives two others to the bonded carrier which delivers the liquor in its original package to shipside. At shipside, a second customs inspector makes sure that the liquor is placed on board the ship and sealed; he then sends a copy of the withdrawal permit, properly noted, back to the Customs authorities.

"By virtue of these operations, the liquor is legally in bond continuously from the moment of its entry into New Jersey until the delivery on board for Stratford's customer. Moreover, under federal law, such liquor may not be removed from its package nor consumed until the ship is beyond the territorial waters of the United States."

FIRST POINT

Under repeated decisions by this and other courts, the Twenty-First Amendment does not govern.

The appellees' business in tax-free bonded liquors for export under federal statutes, regulations, license and supervision throughout, does not entail transportation of intoxicating liquors for "delivery or use" within New Jersey within the meaning of the Amendment. As said below, the liquors are continuously "in the stream of foreign commerce" serving national policies and interests which predestine the liquors for use outside the United States.

The appellant's Jurisdictional Statement recognizes (p. 16) that "the majorities in *Hostetter* and *Ammex*" held the 21st Amendment inapplicable because the ultimate delivery and use is not in the State but in a foreign country, notwithstanding the prior physical transfers of the liquor in its preceding stream of foreign commerce; but the appellant characterizes such *ratio decidendi* as "intellectual gymnastics," and the appellant asserts (pp. 15, 16) that any "actual physical delivery" within the State incidental to the movement in foreign commerce entails "the plenary power of the State under the 21st Amendment,"—all of which is a scarcely veiled way of saying that, stripped of semantic "gymnastics," those decisions were wrong and "a judicial revision of the Amendment," and that "we do not believe that a Commerce Clause inquiry is relevant".

But these decisions have, as recently as April 1966, been cited by this Court as firm law in *Seagram & Sons v. Hostetter*, 384 U. S. 35, 42.

The national purposes and objectives in exempting from tax bonded liquor moving in foreign commerce are expressly stated in the title of the Tariff Act of 1930 itself, of which Sections 309, 311 and 313, and related portions of the Internal Revenue Code, are parts. The title reads:

> "An Act to provide revenue, to regulate commerce with foreign countries, to encourage industries of the United States, to protect American labor, and for other purposes."

The courts have always recognized these national purposes. To quote *National Distillers Products Corporation* v. *City and County of San Francisco*, 297 P. 2d 61, cert. denied, 352 U. S. 928:

> "These (national) provisions would seem to constitute regulation of foreign commerce in the instant case just as similar provisions did in the *Gulf Oil* case. Certainly the purpose of the regulatory scheme is to encourage commerce and give a competitive advantage to these items."

In *Ammex Warehouse* v. *Department of Alcoholic Beverage Control*, 224 F. Supp. 546 (aff'd 378 U. S. 124) the District Court (3 judges) subsequently made like statement of the national objectives. It cited therefor both the decision of this Court in *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414 at p. 427, and the reliance thereon in the *National Distillers* case *supra* (p. 555).

In *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 212 F. Supp. 376, aff'd 377 U. S. 324, the federally licensed seller had its advertised sales-office and its liquor (tax-free and bonded for export) inside the Kennedy airport in New

York City and State. There the buyer came, selected and ordered his desired liquor, made payment therefor, and received a receipt and title. The seller then transported the purchaser's designated liquor from its office and delivered it into the physical custody of the purser of the foreign-bound airline for ultimate handing to the purchaser outside the territorial limits of the United States. Nevertheless the District Court and this Court held that the 21st Amendment did not govern because "ultimate delivery and use is not in New York, but in a foreign country" (377 U. S. at 333; 212 F. Supp. at 384).

In the *Ammex* case, 224 F. Supp. 546, aff'd 378 U. S. 124, there was not only a sale by Ammex to the ultimate consumer at its display room located within the State of California and one mile from the Mexican border, but also *a manual transfer* of the liquor by it to him in an area sixty feet wide on the California side of the border. Nevertheless the District Court (3 judges) found immaterial and "a distinction without a difference" (p. 556) this factual variation from the *Idlewild* case, since the customer thereby received within the State only "the physical custody of the liquor and the legal possession of the liquor remains in the Customs agent until the moment the purchaser crosses the border" (224 F. Supp. at p. 556). "If he does not cross the border, the custody may be taken from the customer." (*Id.* at 549).

This Court must have concurred in thus finding immaterial this factual variation consisting of the seller's manual handing of the liquor within the State to the purchaser himself, for this Court tersely affirmed (378 U. S. 124) on the authority of "***Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324.**"

Hence *Idlewild* is controlling, and *Ammex* is *a fortiori*.

In *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, the defendant imported liquor into California from places outside California and transported it through California for delivery to itself in Yosemite Park (a national Park), and for subsequent delivery to and consumption by purchasers buying from it in the Park. Notwithstanding that the Park was within the continental territory of the United States, this Court held the 21st Amendment inapplicable because (p. 538):

> "There was no transportation into California 'for delivery or use therein.' The delivery and use is in the Park, and under a distinct sovereignty."

This *Collins* decision was followed in *Johnson* v. *Yellow Cab Co.*, 321 U. S. 383, 387, and was later described by this Court in *Carter* v. *Virginia*, 321 U. S. 131, 137, as holding that "shipment through a state is not transportation or importation into the state within the meaning of the (21st) Amendment."

In its most recent decision, to wit *Seagram & Sons* v. *Hostetter*, 384 U. S. 35, this Court, in rejecting Seagram's argument that the 21st Amendment was there inapplicable, nevertheless said as to *Idlewild* (p. 42):

> "In *Idlewild* the ultimate delivery and use of the liquor was in a foreign country. * * * Unlike *Idlewild*, the present case concerns liquor destined for use, distribution, or consumption in the State of New York."

We conclude this Point by quoting the following from the lower court's footnote (261 F. Supp. at pp. 935-6; J.S. pp. 22a, 23a):

"Stratford physically transfers liquor to the shipping lines for distribution to the ultimate consumers on the high seas. Such physical transfer to the passenger carrier also was made in *Hostetter*. But, since Stratford sells to the shipping line, rather than to the consumer, it makes delivery directly to its vendee, as was true in *Ammex*. Neither of these facts sufficed individually to free New York or California from the Commerce Clause, and their coincidence here requires no different result.

"New Jersey urges that completion of both an intermediate sale and a delivery to someone other than the ultimate consumer takes the liquor out of any continuous process of exportation for use in foreign commerce.

"The direct answer to this is that the sale to the carrier is not 'completed' in New Jersey, in view of the finding in *Ammex* that legal possession of such bonded liquor remains in the Customs officer until the border is crossed (or, in our case, until the ship sails beyond territorial waters). If the vessel, or aircraft, or pedestrian tourist fails to leave the United States, Customs may reclaim the liquor. More importantly, the liquor's distribution or use in this country remains a Federal offense. The States have no interest in 'delivery' as such, but only insofar as such transfers raise the possibility of diversion. Idlewild Bon Voyage Liquor Corp. v. Epstein, supra, 212 F.Supp. at 384. The liquor delivered to Stratford's vendees at dockside is as restricted to foreign use, by passengers and crew, as was the liquor delivered to the airlines in *Hostetter*. In any real sense, then, the liquor must be deemed to be constantly in the stream of foreign commerce."

SECOND POINT

Since settled constitutional law excludes New Jersey's right to forbid the appellees' federally licensed business in foreign commerce by reason of what the Jurisdictional Statement terms (p. 16) "the plenary power of the State under the Twenty-First Amendment," New Jersey cannot by indirection jeopardize the appellees' business and the specific national policies and objectives for which it is federally licensed by imposing conditions not clearly and reasonably confined and directed to the narrow purpose of protecting New Jersey against diversion of the bonded liquor while in transit under full federal supervision and federal policing against diversion.

New Jersey's refusal of a Class D "transportation license" for which the appellees had applied, and its insistence on application for and obtaining a Class B "plenary wholesale license" as a condition of legality, clearly exceeds the limited sphere reserved for state action in regard to such liquor business conducted solely in foreign commerce and under and in accordance with the national constitutional power to regulate foreign commerce in the national interest.

The court below said (261 F. Supp. at 937; J.S. 25a):

> "The local interest is clearly defined. Assertion of the police power over federally supervised liquor in bond is predicated on the danger of diversion;"

Neither in its answer nor in its Jurisdictional Statement has New Jersey made any claim that, or shown any instance where, diversion has occurred. Nor has it attempted to show, or even to explain, wherein the Tariff and

Internal Revenue statutes and the elaborate Customs Regulations and continuous federal supervision under which the appellees operate are inadequate or ineffective or have been found such.

Nor does the appellant claim that this detailed federal scheme of minute and continuous supervision is illegal in whole or in part or is not enforced.

We believe that the lower court's opinion on this subject (261 F. Supp. at pages 937 to 941; Jurisdictional Statement, pp. 25a to 35a) states the self-evident and is conclusive. To quote (p. 937; p. 25a):

> "to the extent that it (the federal supervision) minimizes this danger (of diversion), the Federal scheme, while not preempting State action, reduces its justifiable scope.
>
> "The Tariff and Internal Revenue statutes and the Customs Regulations under which Stratford is already operating are elaborate; indeed, they constitute a maze of regulation. The provisions for supervising physical transfer or delivery of the liquor are particularly detailed, *supra*, p. 927, n. 3. The comprehensive policing covers the entire period for which the liquor is in New Jersey. The Director has 'neither alleged nor proved the diversion of so much as one bottle of plaintiffs' merchandise to users within the State of [New Jersey].' *Idlewild Bon Voyage Liquor Corp.* v. *Epstein, supra*, 212 F. Supp., at 386."

This statement of the limited scope constitutionally permissible for State action is fully supported by classic decisions by this Court.

Thus in *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349, an ordinance of a Wisconsin municipality forbade the sale in the city of milk as pasteurized unless it had been pasteurized and bottled at an approved pasteurization plant within five miles of the center of the city. Appellant, an Illinois corporation engaged in gathering and distributing milk from farms in Illinois and Wisconsin, was denied a license to sell its product within the city solely because its pasteurization plants were more than five miles away. In holding that this ordinance was a violation of the Commerce Clause of the Federal Constitution, this Court said (p. 354):

> "A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlesaly discloses an avowed purpose to discriminate against interstate goods. • • •
>
> "Our issue then is whether the discrimination inherent in the Madison ordinance can be justified in view of the character of the local interests and the available methods of protecting them. Cf. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 211 (1944)."

True, in this *Dean Milk* case this Court was weighing an allegedly discriminatory measure against alternative measures available to the city, but the Court's logic applies with equal force in the case of burdens and restrictions imposed by a State upon specific foreign commerce, even though they be not discriminatory, when the national authorization and interest has been exerted and embodied in a national license accompanied with fully particularized

measures against misuse or diversion. See *Bibb* v. *Navajo Freight Lines*, 359 U. S. 520; *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, where this Court said (p. 782):

> "The state interest cannot be preserved at the expense of the national interest by an enactment which regulates interstate train lengths without securing such control, which is a matter of national concern. To this the interest of the state here asserted is subordinate."

In this case, the Federal "statutes and regulations taken together operate as regulations of foreign commerce" in the national interest; and any state action which is an infringement or impairment of, or an interference with, their full purpose and free functioning, must fail constitutionally (*McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 414, 427, 429).

As said by Mr. Justice Jackson, concurring in *Duckworth* v. *Arkansas*, 314 U. S. 390, 401:

> "But to let each locality conjure up its own dangers and be the judge of the remedial restraints to be clamped onto interstate trade inevitably retards our national economy and disintegrates our national society."

The appellees had applied under N.J.S.A. 33:1-13 for a Class D "Transportation License" (opinion below, pp. 928, 938; Jurisdictional Statement, pp. 7a, 27a); but (*id.*):

> "The Director concluded that since the plaintiffs had not procured a wholesale license for their solicitation and sales of tax free liquor, they could not be granted a transportation license to transport liquor for such unlicensed activity."

Of such a "transportation license" the court below said (p. 938; p. 27a):

> "Such a license, issued under N.J.S.A. 33:1-13 and augmented by rules appropriate to its scope, would provide ample authority to permit some supervision of the liquor's transport and transfer until it left the State on board the departing vessels. The fact that Class D licenses would not support regulation of the sales transactions themselves is of no moment; for whatever Stratford's terms of sale, method of solicitation or means of competition, it is the physical movement and storage of the liquor itself which creates the opportunities for diversion. And the physical control would be ensured by the web of Federal and State inspection and custody."

As a precaution, the lower court added in a footnote (p. 938; p. 28a):

> "Of course, this is not to imply that New Jersey would have carte blanche authority to regulate Stratford in any way it chose even under the Transportation license. We need place no such imprimatur on the Class D permit or the permissible scope of regulations thereunder applicable to Stratford. The validity of the transportation license requirement is not before us since the plaintiffs have agreed to accept one. If its implementation leads to rules applied to Stratford which are challenged as outside the sphere permitted New Jersey by *Hostetter* and *Ammex*, that too will be 'another case for another day.'"

The plaintiffs are not doing liquor business except that in tax-free bonded liquor under federal constitutional license for foreign commerce. New Jersey's position that this specific federally licensed business is illegal unless the

plaintiffs apply for and are granted a "Plenary Wholesale license" (Class B) is tantamount to nullifying the federal license and objectives and to creating by indirection what the appellants call "plenary power" in New Jersey.

The New Jersey statute as to such a "Plenary Wholesale license" is quoted in the lower court's footnote (pp. 926, J.S. 2a); and of it the lower court said (pp. 937, J.S. 26a):

> "In this context, the Class B wholesale license applied to Stratford inherently exceeds the limited sphere reserved for State action in regard to such liquor trade. The cases indicate no more than New Jersey's power to oversee the storage and movement of the bonded shipments through her territory. Moreover, those decisions actually approving some regulation involved no comprehensive Federal scheme remotely comparable to that presented here. Yet the wholesale license subjects Stratford to the Director's wide ranging power to regulate all aspects of the sales transactions themselves, as well as other facets of its business having little if any relation to the minimal dangers of diversion."

Among other things, a "Plenary Wholesale license" would restrict the plaintiffs to selling and distributing "to retailers and wholesalers licensed in accordance with this chapter"; and to selling "from inventory in a warehouse located in New Jersey which is operated under a plenary wholesale license". It would also require plaintiffs to pay an annual fee of $3,000,—thus adding what in effect would be a large tax upon what Congress had in its exercise of power freed from taxation for the accomplishment of national objectives in the interest of American industry and labor.

Should New Jersey be upheld in attempting such interferences and barriers, New York would be stimulated to escalate thereon by superimposing on the plaintiffs' like business on its side of the Port a required application for a plenary wholesale license and the payment therefor of an annual fee of $5,000 (N. Y. Alcoholic Beverage Control Law, Section 66 as amended L. 1963, c. 204, §13).

Furthermore, the statutory content of a New Jersey "Plenary Wholesale license" (N.J.S.A. 33:1-11) entails much more, as shown in detail in the following footnote to the opinion below (p. 937; J.S. p. 27a):

> "Section 33:1-11 itself merely states that the Class B wholesale licensee shall operate 'subject to rules and regulations * * *' This proviso is implemented by Section 33:1-39 which lists the broad range of subjects over which the Director may issue rules and regulations appropriate to the subjects encompassed by each class of license. For the impressive sweep of the Director's powers over, *inter alia*, wholesale transactions and distribution within New Jersey, see *Boller Beverages, Inc.* v. *Davis*, 38 N. J. 138, 183 A.2d 64 (1962). 'Section 39 * * * then goes on in a second paragraph to specify some 30 detailed categories which general rules and regulations may cover, some of which relate to matters also the subject of specific statutory sections and others of which are not otherwise mentioned in the act, and winds up with sweeping authority to promulgate regulations relating to 'practices unduly designed to increase consumption of alcoholic beverages * * * and such other matters whatsoever as are or may become necessary in the fair, impartial, stringent and comprehensive administration of the law.'"

Also, as the lower court likewise noted in a footnote (p. 939; J.S. p. 8a) the same New Jersey statute makes it a misdemeanor to make an unlicensed sale.

Local taxation of bonded liquor in the stream of foreign commerce, under circumstances quite similar to those of the instant case, has been struck down as an impermissible interference with foreign commerce. *National Distillers Products Corporation* v. *City and County of San Francisco*, 297 P.2d 61, *cert. denied* 350 U. S. 928.

In that case, San Francisco imposed *ad valorem* personal property taxes on certain cases, among others, of bonded, federally-regulated liquor stored in that city prior to being sold in bond directly to owners of vessels engaged in foreign commerce, and placed in bond upon such vessels as ships' stores, to be consumed at sea (p. 63). The court ruled that the bonded liquor was subject to the federal regulations of foreign commerce designed to encourage commerce and give a competitive advantage to such items, and that the imposition of the local taxes would result in an interference with this purpose (p. 65). The City of San Francisco had argued that, since the liquor transactions could be broken down into two steps, namely, a shipment into San Francisco and a subsequent shipment out in foreign commerce, the storage of such goods in San Francisco constituted a break in transit so as to remove them from interstate commerce. To this the District Court replied (p. 66):

> "However, in the instant case the goods are not immune from local taxation because they had been traveling in interstate commerce. Rather, under the rationale of the Gulf Oil case, they derive their immunity from local taxation under the commerce clause by reason of the fact that the federal government has regulated their manufacture, transportation, storage, and exportation in furtherance of commerce, and that such taxes would constitute an interference with that regulation."

The District Court also unanimously affirmed the following finding of fact and conclusion of law by the trial court (p. 63):

> "The court found that 'the production, transportation to San Francisco, detention in a public warehouse, and movement aboard vessels under bond for delivery to customers and destinations in foreign countries or consumption on the high seas constituted integrated steps in a movement of goods in interstate and foreign commerce in the process of shipment either to foreign destinations or for consumption aboard vessels on the high seas, in accordance with plaintiff's plan and intent.'"

We conclude by urging as self-evident the conclusion of the court below (p. 941, J.S. p. 35a):

> "We hold that the burden imposed is so substantial, and the ensuing interference with national policy so clearly avoidable, that the application of N.J.S.A. 33:1-11 to Stratford must fail as an impermissible restraint on foreign commerce. We concur with the plaintiffs that such a requirement is defective both in that it imposes the undue burden we have just examined and that it subjects Stratford to inherently excessive State regulation."

Conclusion

The appellees' motion for summary affirmance should be granted, with costs.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

LORDI, DIRECTOR OF DIVISION OF ALCOHOLIC BEVERAGE CONTROL, ETC. *v.* EPSTEIN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

No. 322. Decided October 16, 1967.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. Cf. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324.

MR. JUSTICE BLACK and MR. JUSTICE HARLAN would note probable jurisdiction and set the case for oral argument.